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In The Supreme Court of the United States

WACHOVIA BANK, N.A.,
Petitioner,

v.

EASTMAN KODAK COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The decision of the court of appeals in this case furthers a split of circuit authority, which creates substantial confusion and uncertainty as to the application of res judicata in bankruptcy cases. The questions presented are:

1. Whether the Eleventh Circuit's decision, which limits the application of res judicata in a bankruptcy case to issues whose resolution "explicitly becomes an essential part of the bankruptcy plan" erroneously restricts the scope of the doctrine, in conflict with decisions of the Second, Third, Fifth, and Seventh Circuits, which apply res judicata to preclude all claims, defenses, and issues arising from a common nucleus of facts that *were or could have been* asserted in a bankruptcy case.

2. Whether the Eleventh Circuit's decision, which limits the application of res judicata in a bankruptcy case to matters within a bankruptcy court's core jurisdiction, erroneously circumscribes the application of the doctrine in bankruptcy, in conflict with the Second, Third, Sixth, Ninth, and Tenth Circuits, which apply res judicata to all claims, defenses, and issues arising from a common nucleus of facts that *were or could have been* decided in a bankruptcy case, regardless of whether those claims fall within the bankruptcy court's core or "related to" jurisdiction.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner, Wachovia Bank, N.A., is a national bank and a wholly owned subsidiary of Wachovia Corporation, which is a publicly traded company.

Petitioner, Wachovia Bank, N.A., serves as agent for a group of lenders that participated in loans to the debtor in this case. The lenders, none of which was a party in the court of appeals, include AmSouth Bank (a wholly owned subsidiary of AmSouth Bancorporation, which is a publicly traded company), Fifth Third Bank (a wholly owned subsidiary of Fifth Third Bancorp, which is a publicly traded company), Washington Mutual Bank (a wholly owned subsidiary of Washington Mutual, Inc., which is a publicly traded company), Harris N.A. (a wholly owned subsidiary of Bank of Montreal, which is a publicly traded company), Bank of America, N.A. (a wholly owned subsidiary of Bank of America Corp., which is a publicly traded company), U.S. Bank National Association (a wholly owned subsidiary of U.S. Bancorp, which is a publicly traded company), SunTrust Bank (a wholly owned subsidiary of SunTrust Banks, Inc., which is a publicly traded company), and Stonehill Institutional Partners, L.P. (which is not a publicly traded company).

Other parties in the court of appeals were Eastman Kodak Company; Atlanta Retail, Inc. f/k/a Wolf Camera, Inc.; Atlanta Retail Subsidiary, LLC f/k/a WolfExpress.Com, LLC; Atlanta Retail, L.P. f/k/a Texas Photo Finish, L.P.; and Atlanta Retail Partner, Inc. f/k/a Fox Photo Partner, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Wachovia Bank, N.A., respectfully petitions for a writ of certiorari to review the judgment of the court of appeals in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, 1a-22a) is reported at 456 F.3d 1277. The opinion of the district court (App. B, 23a-41a) is not officially reported, but can be found at 2005 U.S. Dist. LEXIS 42970. The opinion of the bankruptcy court (App. C, 42a-55a) is reported at 297 B.R. 299. Earlier orders of the bankruptcy court (Apps. D-I, 56a-159a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The jurisdiction of bankruptcy courts is governed by 28 U.S.C. § 1334(a) and (b), and 28 U.S.C. § 157(b)(1) and (2) and (c)(1). The relevant statutory provisions are reproduced in the Appendix. (Apps. M-N, 200a-204a.)

STATEMENT OF THE CASE

A. Factual Background

This case raises important issues regarding the proper res judicata effect of bankruptcy court orders. The case arises from the bankruptcy of Wolf Camera, Inc., a specialty retailer of photographic products. Petitioner, Wachovia Bank, N.A., was Wolf's principal senior secured creditor.[1] Respondent Eastman Kodak Company was another major creditor of Wolf, both as a lender and as Wolf's principal supplier. A critical issue in the Wolf bankruptcy was the relative priority of Wachovia and Kodak, as secured creditors of Wolf. In particular, Kodak and Wachovia disagreed about the treatment of an admittedly junior $30 million loan that Kodak made to Wolf approximately one year before the Wolf bankruptcy.

The relevant sequence of events is as follows:

In September 1998, at a time when Kodak and Wachovia already were substantial secured creditors of Wolf, Kodak, Wachovia, and Wolf entered into a Subordination Agreement and an Intercreditor Agreement. In the Subordination Agreement, Kodak agreed that all of its loans to Wolf would be subordinate to the loans made by Wachovia. The Intercreditor Agreement provided, among other things, that Kodak and Wachovia would keep each other informed of occur-

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[1] Wachovia is the successor in interest to First Union National Bank, which was both a senior lender to Wolf and the administrative agent for itself and a group of other senior lenders to Wolf. The term "Wachovia" includes these other senior lenders as well as Wachovia itself.

rences that could significantly affect Wolf's ability to meet its obligations.

Under its loan agreements with Wachovia, Wolf could not incur additional indebtedness or obtain financial accommodations from Kodak without Wachovia's prior written consent. In the Intercreditor Agreement, Kodak expressly consented to this limitation.

In March 2000, at a time when Wolf was showing signs of financial distress, Kodak negotiated a new $30 million secured loan to Wolf. Kodak has alleged that, in making the loan, it did not know Wolf's true financial condition and was relying on disclosure from Wachovia. Kodak also alleged that it intended for Wolf to use the proceeds of the loan to expand its operations and the volume of its purchases from Kodak. Having agreed that Wolf could not incur debt without Wachovia's prior consent, Kodak expressly conditioned the funding of the $30 million loan on Kodak's prior receipt of Wachovia's written consent in a form acceptable to Kodak. In addition, Kodak conditioned its loan upon its receipt from Wolf of current financial information and representations as to the status of its loan agreement with Wachovia.

Wolf obtained Wachovia's written consent to the loan from Kodak. In keeping with the Subordination and Intercreditor Agreements, Wachovia's consent provided that Kodak's loan would be junior and subordinate to Wachovia's loans in all respects. Wachovia, as a condition of its consent and waiver of the restriction on additional debt, required that the $30 million loan proceeds be used by Wolf to reduce Wolf's outstanding obligations to Wachovia, which then exceeded $100 million.

Although Kodak conditioned its loan to Wolf on prior receipt of Wachovia's consent, Kodak admittedly delivered the entire $30 million to Wolf before it received Wachovia's consent, which described how the loan proceeds would be

used. When Wolf received the $30 million in its account, the funds were applied, as required in Wachovia's consent, to reduce Wolf's revolving credit obligations to Wachovia.[2] At no time did Kodak demand that the funds be returned by Wolf.

More than a year later, in June 2001, Wolf filed a voluntary petition under Chapter 11 of the Bankruptcy Code in the Bankruptcy Court for the Northern District of Georgia. The proofs of claim filed by Kodak and Wachovia in the bankruptcy court showed that, as of the time Wolf filed its petition, Wolf owed Wachovia approximately $78 million (net of the $30 million loan) and Kodak approximately $98 million (including the $30 million loan). Thousands of other creditors, including landlords, trade vendors, utilities, tax authorities, and employees, also filed proofs of claim exceeding $45 million.

In addition, during the course of the bankruptcy case, Wolf incurred further obligations, in excess of $25 million, to landlords, employees, trade vendors, and professionals engaged by Wolf, the Creditors Committee, and Wachovia.[3] Under the Bankruptcy Code, such post-petition administrative priority expenses could be paid only from unencumbered assets. As Wachovia asserted a senior lien on substantially all of Wolf's assets, Wachovia's prior consent was required for the payment of these claims from its collateral.

Wolf's reorganization effort did not yield sufficient proceeds to pay all creditors in full. In fact, the proceeds were not sufficient even to pay Wachovia, the senior secured lender, in full. It was only as a result of Wachovia's consent to forgo $25 million of its potential recovery that administrative expense creditors were paid, so that the case could pro-

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[2] Under the loan documents, Wolf could re-borrow up to this amount from Wachovia under its revolving credit line.

[3] The "Creditors Committee" refers to Wolf's official committee of unsecured creditors. Kodak was an *ex officio* member of the Committee with access to all Committee information and deliberations.

ceed in an orderly manner. Ultimately, Wachovia recovered approximately $40 million of its $78 million claim. The bankruptcy court found that, under the Subordination and Intercreditor Agreements, Kodak was not entitled to and would not receive any payment on its claim until Wachovia was paid in full. These were the financial realities that led Kodak, after participating actively throughout the bankruptcy proceedings, to attempt to circumvent the bankruptcy court's jurisdiction by initiating a separate action against Wachovia in Rochester, New York. Kodak sought to recover the same $30 million that the bankruptcy court found was subject to the Subordination Agreement.

B. Proceedings in the Bankruptcy Court

1. The Financing Order

Wolf required bankruptcy court authority to use its secured lenders' collateral and to borrow new money to fund the ongoing administrative expenses of operating its business during the bankruptcy. Wachovia, as Wolf's senior secured lender, was willing to consent to the use of its cash collateral and to provide new loans to Wolf. In July 2001, on motions duly served on Kodak, and following hearings at which Kodak was represented, the bankruptcy court, exercising its core jurisdiction, granted authority for Wolf to borrow up to $10 million from Wachovia and to use Wachovia's cash collateral (the "Financing Order"). (App. I, 134a.)[4]

In granting this motion, the bankruptcy court found that Wachovia's claims, in the amount of approximately $78 million, were valid and secured by unavoidable first priority liens in substantially all of Wolf's assets. The bankruptcy court also

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[4] District courts have implemented 28 U.S.C. § 1334 by issuing standing orders referring bankruptcy cases directly to bankruptcy courts, which, under 28 U.S.C. § 157(b) and (c), have jurisdiction to enter final orders in core proceedings, and to render proposed findings of fact and conclusions of law in non-core related matters.

found that Kodak's claims were subordinate to Wachovia's. Kodak did not object to these findings, to the core jurisdiction of the bankruptcy court, or to the Financing Order.

Had Kodak timely objected to the bankruptcy court's findings on the ground that Wachovia allegedly had breached the Subordination or Intercreditor Agreement or had acted in a manner that rendered the Subordination Agreement unenforceable, the entire course of the bankruptcy case would have changed. For example: First, Wachovia, the only party willing to extend new loans to Wolf, and to forgo a portion of its secured recovery, may not have done so without the priorities afforded its existing claims and liens. Second, creditors who received millions of dollars upon Wachovia's consent would have received nothing. Third, if Kodak prevailed on its objection to Wachovia's priority, Kodak would have become the senior creditor, entitled to distributions ahead of Wachovia. Fourth, to the extent the objections were not resolved, any Chapter 11 plan or settlement with other creditors would have been materially different in order to preserve Kodak's claims against Wachovia or to subordinate Wachovia's claims to Kodak's.

2. The Sale Order

By July 2001, it became clear that Wolf would be required to engage in an orderly liquidation. Wolf filed a motion to sell substantially all of its assets for approximately $70 million to Ritz Camera Center, Inc. (the "Ritz Sale"). The assets to be sold were subject to the liens of Wachovia and Kodak in the order of priority set forth in the Subordination Agreement. The proposed sale was subject to higher and better offers—of which there were none.

Kodak objected to the Ritz Sale, on the ground that, as a secured creditor, its consent was required unless the proceeds were sufficient to satisfy *all* secured claims. In its objection, Kodak admitted that its claims and liens were subordinate to

Wachovia's and that the interests of Kodak and Wachovia in Wolf's assets were not in dispute. Kodak did not contest the effect of the Subordination Agreement or claim that Wachovia breached the Intercreditor Agreement.

The bankruptcy court, exercising its core jurisdiction, specifically found that, under the Subordination and Intercreditor Agreements, Kodak's claims and liens were subordinate to Wachovia's and that Kodak would not receive any distribution until Wachovia's claims were satisfied in full. Given that the net proceeds of the sale (approximately $58 million) were less than Wachovia's claims, the bankruptcy court found that Kodak's claims were unsecured and that Kodak, therefore, did not have standing as a secured creditor to object to the sale under Bankruptcy Code § 363(f). Thus, the bankruptcy court overruled Kodak's objection and approved the sale in an order dated September 21, 2001 (the "Sale Order"). (App. H, 106a.) Kodak did not appeal.

Implementing the Sale Order, on notice to Kodak, the bankruptcy court, exercising its core jurisdiction, on September 24, 2001, approved a distribution of the cash proceeds of the Ritz Sale as follows: first, to repay Wachovia's bankruptcy financing ($5.7 million); second, to repay Wachovia up to $20 million on account of its existing pre-bankruptcy loans; third, to pay administrative expenses in the bankruptcy case up to $25 million; and finally, to the extent of any excess proceeds, to repay Wachovia up to an additional $16 million on account of its existing pre-bankruptcy loans. Kodak did not object to this distribution. Thus, based on the findings of the bankruptcy court that Kodak was bound by the Subordination and Intercreditor Agreements, Wachovia consented to allow $25 million of the proceeds of its collateral to be used to satisfy the claims of unsecured administrative expense creditors, which facilitated the administration of the bankruptcy case.

3. The Settlement Order and the N.Y. Action

The Creditors Committee was the only party in interest to timely commence a proceeding in the bankruptcy court to challenge the validity, priority, and extent of Wachovia's liens and claims as determined in the Financing Order. The Committee filed its complaint in the bankruptcy court in January 2002. Thereafter, Wachovia, Wolf, and the Committee negotiated a global settlement, which the bankruptcy court recognized was the last obstacle to formulating a Chapter 11 plan in the bankruptcy case (the "Settlement"). The Settlement provided, in pertinent part, that Wachovia would: (a) have an allowed secured claim of not less than $40 million, subject only to the prior payment of up to $25 million for allowed administrative expenses; (b) have an allowed unsecured claim for approximately $37 million; and (c) share any distribution on account of its unsecured claim *pro rata* with general unsecured creditors, *other than Kodak*, which, pursuant to the Subordination Agreement, would receive no distribution until all of Wachovia's claims were paid in full. Under the Settlement, all challenges to the validity, extent, and priority of Wachovia's claims were withdrawn with prejudice.

On May 30, 2002, after the Settlement had been negotiated, but before it was presented to the bankruptcy court for approval, Kodak commenced an adversary proceeding against Wachovia in the Wolf bankruptcy case (the "N.Y. Adversary Proceeding"). (App. A, 6a.) Kodak did not file the N.Y. Adversary Proceeding in Georgia where the Wolf bankruptcy had been pending for nearly a year, but in the bankruptcy court in Rochester, New York, where Kodak has its head-quarters.

In the N.Y. Adversary Proceeding, Kodak alleged that, in or about March 2000, Wachovia failed to disclose Wolf's financial condition and the terms of its consent to the Kodak loan, thereby (i) breaching the Subordination and Intercreditor Agreements; (ii) fraudulently inducing Kodak to lend

Wolf $30 million; and (iii) tortiously interfering with Kodak's $30 million loan agreement. Relying on Wolf's pending bankruptcy case, Kodak alleged that the bankruptcy court in New York had core jurisdiction to: (i) equitably subordinate Wachovia's claims to Kodak's claims to the extent of $30 million; and (ii) award Kodak compensatory and punitive damages in an amount not less than $30 million.

On June 7, 2002, the Settlement was executed by Wachovia, Wolf, and the Committee. The bankruptcy court in Georgia held a hearing on July 16, 2002. Before that hearing, Wachovia (joined by Wolf) moved to dismiss the N.Y. Adversary Proceeding or, in the alternative, to transfer it to the bankruptcy court in Georgia on the ground that the court in which the Wolf bankruptcy case was pending had exclusive jurisdiction to determine all matters that were either core or "related to" the Wolf bankruptcy case. Kodak filed an objection to the Settlement in the bankruptcy court, seeking to preserve its right to assert its claims against Wachovia. With Wachovia's motion to dismiss the N.Y. Adversary Proceeding pending, Kodak, Wachovia, and Wolf appeared at the July 16 hearing in Georgia and addressed the bankruptcy court with respect to the Settlement (App. J, 160a-168a):

> [Wolf]: The only objection that has been filed to the application is the limited objection by Kodak regarding its attempt to preserve its claims against the bank group.
>
> One of the reasons for the bank group's willingness to settle, and this is clear from the language of the stipulation, one of the reasons for its willingness to settle with the committee on the $40 million basis was, as set forth in paragraph 10 of this stipulation, the condition that the Kodak subordination agreement be enforced.
>
> Paragraph 11 of the stipulation reserves Kodak's opportunity to be heard on that issue. That opportunity, we submit, is today, your Honor.

* * *

The settlement with the Committee is the linchpin of the plan of liquidation that we filed yesterday; and without the settlement, we don't have a plan.

* * *

Moreover, your Honor, the debtors do not believe that the issue of enforceability of the subordination or the relative priority of the bank's claims and the Kodak claims should be litigated in Rochester or any other court other than this court.

* * *

THE COURT [addressing counsel for Kodak]: Okay, anything else, Mr. Sklar? Because I just want to find out where there's disagreement, then the Court will rule. Any other matter?

[Kodak]: No. I believe that's it, your Honor.

[Kodak]: Dan, paragraph 11, we want to make clear that this does not constitute our notice and opportunity to be heard.

* * *

[Kodak]: Yes, just to reiterate that this isn't the hearing on the enforcement of the subordination agreement under paragraph 11.

* * *

THE COURT: All right. Well, okay, I just want to make sure I get everything that you have, and then we're going to resolve everything. So is that it?

[Kodak]: Yes, sir.

* * *

[Wachovia]: Kodak has filed its pleading. It's made its objection. We believe that this was their opportunity to be heard.

* * *

> THE COURT: The Court also notes that prior to even the presentation made, the Court recalls several instances where the Kodak subordination agreement was brought up in hearings and the Court remembers that . . . it was in no question that in the Court's mind that the subordination agreement was enforceable. It mentioned that, in the consideration on the objection to the sale, it's noted in . . . Kodak's own pleadings and it had mentioned several times in the cash collateral order, it's highlighted in the 9019 motion, so I don't believe there's any real surprise, I don't think there's anything real new about it, and so the Court is of the view that this really is not striking any new ground. It's just merely tying up some ends based on prior rulings, prior orders, and prior positions of the parties in the case. So the Court finds that that agreement is enforceable and will approve the 9019 motion.
>
> [Wolf]: Point of clarification. Your Honor ruled that that agreement is enforceable. Was your Honor referring to the subordination agreement?
>
> THE COURT: Yes.

The bankruptcy court, in the exercise of its core jurisdiction, approved the Settlement. Kodak did not appeal. Kodak then voluntarily dismissed the N.Y. Adversary Proceeding and immediately began a new lawsuit against Wachovia in New York State Supreme Court in Rochester (the "N.Y. Action").[5] (App. A, 7a.) The complaint in the N.Y. Action was substantially identical to the complaint previously filed by Kodak in the N.Y. Adversary Proceeding in the Wolf bankruptcy case. It contained the same factual allegations and the same claim for $30 million in damages. The *only* material difference was

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[5] The N.Y. Action was removed to and is pending in the United States District Court for the Western District of New York. The action has been stayed pending this Court's disposition of the case.

that the complaint in the N.Y. Action omitted Kodak's equitable subordination claim asserted in the N.Y. Adversary Proceeding. (App. L, 182a.)

4. The Chapter 11 Plan and the Injunction Entered by the Bankruptcy Court

Wolf filed a Chapter 11 plan (the "Plan") that detailed the treatment of claims and interests, including the validity and priority of the claims of Wachovia and Kodak. The Plan specifically incorporated and implemented the Settlement, the Sale Order, the Financing Order, and the bankruptcy court's prior findings with respect to the Subordination and Intercreditor Agreements. Under the Plan, Kodak would, in accordance with the Subordination Agreement and the bankruptcy court's prior orders, receive no distribution until Wachovia was paid in full.

In the N.Y. Action, however, Kodak was seeking to recover from Wachovia the same $30 million that Kodak could not recover in the bankruptcy case, given the bankruptcy court's rulings that Kodak was bound by the Subordination and Intercreditor Agreements. Faced with the possibility of an inconsistent judgment in the N.Y. Action with respect to the Subordination Agreement, Wachovia would not vote in favor of the Plan and Wolf could not confirm the Plan. In October 2002, in furtherance of Wolf's effort to obtain confirmation of the Plan, Wolf and Wachovia jointly filed a complaint in the bankruptcy court seeking to enjoin Kodak's prosecution of the N.Y. Action. The injunction complaint asserted that the prior orders of the bankruptcy court were res judicata with respect to all claims and causes of action pleaded in the N.Y. Action, that the N.Y. Action was inconsistent with such orders, and that the bankruptcy court therefore had core jurisdiction to enforce such orders by entering an injunction against Kodak. On October 16, 2002, the bankruptcy court granted a preliminary injunction. (App. B, 29a.) The bankruptcy court found (App. K, 174a):

> THE COURT: ... [T]he first reaction that this Court would always have is ... what does [the N.Y. Action] have to do with me? ... But then we do a step by step back, and I look at ... what's this in context of? And what all happened in the bankruptcy proceeding. And it seemed ... that at various times Kodak through counsel, ... seemingly came up to the edge of this several times in the proceeding, ... but held it back. ...
>
> And from that point, it seemed almost tactical that the bank did change position that they did let their cash collateral be used, they did agree to have $25 million of administrative expenses funded, which they wouldn't have had to do. ... I don't think they would have done that and tried to wrap it up if they thought that this was just a preliminary matter and then they had to go to battle on their claim at some later date. And that's where I think that the importance comes in the concept of, you had a chance to raise it.

With the preliminary injunction in place, Wachovia voted in favor of the Plan, which was overwhelmingly approved by all creditors entitled to vote. On December 12, 2002, a confirmation hearing was held, and on January 7, 2003, the bankruptcy court, exercising its core jurisdiction, issued an order confirming the Plan (the "Confirmation Order"). (App. D, 56a.) Kodak did not object to the Plan or appeal the Confirmation Order.

Thereafter, in January 2003, Wachovia and Wolf moved for summary judgment on the injunction complaint. The bankruptcy court granted the motion, permanently enjoining Kodak's prosecution of the N.Y. Action. (App. C, 42a.) The bankruptcy court recognized that the facts, transactions, and issues underlying the orders entered in the bankruptcy case, and the facts, transactions, and claims alleged in the N.Y. Adversary Proceeding and in the N.Y. Action, were identical. The bankruptcy court rejected Kodak's assertion that the N.Y. Action was nothing more than an unrelated intercreditor

dispute. Recognizing that, in the N.Y. Action, Kodak decided to drop the equitable subordination claim previously asserted in the N.Y. Adversary Proceeding, the bankruptcy court observed (App. C, 50a):

> This change certainly raises the concern that Kodak may have removed the Section 510 equitable subordination claim to facially escape the inevitable conclusion that the claims should have been raised during the course of the bankruptcy proceeding.

The bankruptcy court determined that the elements of res judicata had been satisfied and that Kodak could have asserted its claims, but made a "tactical decision to forgo its one bite at the apple." (App. C, 55a.)

C. The Decisions of the District Court and the Court of Appeals

On appeal, the district court rejected Kodak's contention that the N.Y. Action is an unrelated intercreditor dispute that was not and could not have been resolved by the bankruptcy court. (App. B, 39a.) The district court ruled that the N.Y. Action is an impermissible collateral attack on the bankruptcy court's jurisdiction and prior orders, because it is based on the same claims and causes of action that *were* or *could have been* raised by Kodak in the bankruptcy case. The district court held (App. B, 40a):

> Kodak actually did bring those claims, in addition to a claim for equitable subordination, in the form of an adversary proceeding in . . . New York. Kodak could have just as easily pursued the New York Adversary Proceeding in the Georgia bankruptcy court or raised its claims as objections during the various hearings conducted during the Bankruptcy Proceeding.

The court of appeals reversed and vacated the injunction issued against Kodak. The court held that (App. A, 2a):

> [R]es judicata does not bar the New York Action because Kodak could not have received a full remedy in the contested Wolf bankruptcy proceedings and because the same nucleus of operative fact was not presented in the two actions. Moreover, res judicata does not require a creditor to raise an independent state law claim against a co-creditor in an adversary bankruptcy proceeding unless the resolution of that claim explicitly becomes an essential part of the bankruptcy plan.

The court of appeals' constricted view of res judicata conflicts with the decisions of several other circuits that have considered the subject in bankruptcy cases. Properly perceived, res judicata applies to all claims or causes of action that arise from a common nucleus of operative facts that *were or could have been* decided in the bankruptcy case. Whether a claim was or could have been brought is determined by examining whether the party *could have* obtained relief in the bankruptcy case in the exercise of a bankruptcy court's core *or* "related to" jurisdiction. Under this standard, the injunction entered by the bankruptcy court and upheld by the district court should have been sustained.

REASONS FOR GRANTING THE PETITION

There is a conflict among the circuits regarding the proper application of res judicata in the context of bankruptcy cases. This important issue directly affects the ability of bankruptcy courts to perform their appointed tasks. The court of appeals' decision here, by permitting a party to withhold claims related to a bankruptcy and then to raise those claims in separate litigation, threatens to undermine the ability of bankruptcy courts to efficiently effect a comprehensive resolution of issues arising from the relationships among a debtor and its creditors. Uncertainty about the proper application of a fundamental legal principle that is virtually always implicated in bankruptcy cases is likely to have a detrimental effect on the

efficient administration of bankruptcy cases throughout the country. The conflict should not be permitted to persist.

The court of appeals offered two rationales for its decision. Neither is persuasive, and both are inconsistent with the decisions of other federal courts of appeals.

First, the court said that Kodak could not have received a full remedy in the Wolf bankruptcy and that the "same nucleus of operative fact was not presented in the two actions." (App. A, 2a.) This is wrong in both respects. As to the "full remedy" point, the court of appeals disregarded the fact that, given the size of the Wolf estate and the amount of Wachovia's recovery, Kodak could have been made whole *in the bankruptcy case* if it had successfully prosecuted its equitable subordination or damage claims in the bankruptcy court. More fundamentally, the court of appeals' conclusion as to the availability of a "full remedy" ignores the "related to" jurisdiction of the bankruptcy courts, under which bankruptcy courts can make recommendations to their supervising district courts on matters relating to the bankruptcy case, and the parties thus can obtain a binding judgment for all the relief to which they may be entitled. The court of appeals' restrictive approach cannot be reconciled with that of the Second, Third, Sixth, Ninth, and Tenth Circuits, all of which have recognized that the res judicata effect of a bankruptcy proceeding is applicable to adversary proceedings and contested matters whether they are based on the bankruptcy court's core or "related to" juris-diction. *See CoreStates Bank, N.A. v. Huls Am., Inc.*, 176 F.3d 187, 197, 199 (3d Cir. 1999); *Sure-Snap Corp. v. State St. Bank & Trust Co.*, 948 F.2d 869, 873 (2d Cir. 1991); *Plotner v. AT&T Corp.*, 224 F.3d 1161, 1173 (10th Cir. 2000); *Robertson v. Isomedix, Inc. (In re Int'l Nutronics, Inc.)*, 28 F.3d 965 (9th Cir. 1994); *Sanders Confectionary Prods., Inc. v. Heller Fin. Inc.*, 973 F.2d 474, 482-83 (6th Cir. 1992).

As to the court's statement about the absence of a common nucleus of operative fact, the court simply disregarded the virtually complete overlap of the facts and issues that *were or could have been* considered by the bankruptcy court and that are now asserted in the N.Y. Action. The court came to this conclusion only by failing to consider what could have been raised by Kodak and by allowing Kodak to dictate, based on the allegations that it did or did not make in the bankruptcy, the bounds of res judicata. Res judicata is not limited, however, only to matters that a court actually considered or was required by statute to consider, and the party against whom res judicata should apply does not control its application by its tactical decisions to raise or not raise claims or evidence.

Second, the court of appeals said that Kodak was not obliged to raise its claim against Wachovia unless the resolution of that claim "becomes an essential part of the bankruptcy plan." The court then stated that Kodak's claim "in no way impacted on" confirmation of the Wolf Chapter 11 Plan. This rationale for refusing to apply res judicata is flawed, both factually and legally.

The course of the Wolf bankruptcy and the bankruptcy plan were directly affected by Kodak's decision not to challenge the Subordination Agreement or otherwise to assert its claim against Wachovia. The bankruptcy case was primarily concerned with sorting out the triangular relationship among Wolf, Wachovia, and Kodak, and it proceeded as it did only because the superior position of Wachovia's loans was recognized by the bankruptcy court and not contested by Kodak.

More fundamentally, as a legal matter, the scope of res judicata is measured not merely by issues actually litigated, but also by issues so logically connected to the issues being considered that they could or should have been litigated in the first proceeding. The Second, Third, Fifth, and Seventh Circuits have explicitly acknowledged and taken this approach in the bankruptcy context. *CoreStates*, 176 F.3d at

197, 199; *Bank of LaFayette v. Baudoin (In re Baudoin)*, 981 F.2d 736, 739 (5th Cir. 1993); *Sure-Snap*, 948 F.2d at 873; *Secon Serv. Sys., Inc. v. St. Joseph Bank & Trust Co.*, 855 F.2d 406, 410 (7th Cir. 1988).

Res judicata protects parties from inconsistent judgments, relieves parties of the cost and vexation of multiple lawsuits, and encourages reliance on adjudication of all issues that were or could have been raised as claims or defenses to claims. *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Res judicata is applicable when (i) the prior decision has been rendered by a court of competent jurisdiction; (ii) the prior decision is a final judgment on the merits; (iii) both cases involve the same parties or their privies; and (iv) both cases involve the same causes of action. *Federated Dep't Stores, Inc. v. Moitie*, 452, U.S. 394, 398 (1981). This Court has held that "[r]es judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." *Brown v. Felsen*, 442 U.S. 127, 131 (1979).

Res judicata is particularly critical in bankruptcy cases. The bankruptcy system is designed to bring all of the debtor's stakeholders into a single forum to *efficiently* resolve the validity, extent, and priority of all competing claims and interests so that estate assets can be equitably distributed.[6] *Katchen v. Landy*, 382 U.S. 323, 328 (1966). This can only be accomplished if all stakeholders who may participate in the bankruptcy case are bound by the decisions of the

[6] "Bankruptcy is a collective process in which all parties share in an inevitably inadequate estate. The bankruptcy court is the forum in which all parties resolve disputes regarding distribution of estate resources." *Official Comm. of Unsecured Creditors of Operation Open City, Inc. v. N.Y. Dep't of State (In re Operation Open City, Inc.)*, 148 B.R. 184, 185-86 (Bankr. S.D.N.Y. 1992). *See also Cent. Va. Cmty. Coll. v. Katz*, 126 S. Ct. 990, 996 (2006).

bankruptcy court.[7] As this Court has admonished, bankruptcy courts must have comprehensive jurisdiction so that they can deal efficiently and expeditiously with *all* matters that arise in or relate to the administration of the bankruptcy estate, including "the power to issue compulsory orders to facilitate the administration and distribution of the *res*." *Cent. Va. Cmty. Coll.*, 126 S. Ct. at 996; *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995).

The court of appeals' ruling is antithetical to the fundamental principles of res judicata and the bankruptcy process. The court focused incorrectly only on the relief sought in particular bankruptcy proceedings (*i.e.*, approving bankruptcy financing, asset sales, and settlements; determining claim priorities; distributing property of the estate; and confirming a plan), rather than on the facts and issues presented or not presented that the bankruptcy court either actually considered or necessarily was required to consider in granting or denying such relief. The bankruptcy court actually considered the absence of any challenge to the Subordination and Intercreditor Agreements and was required to consider the intercreditor priorities in administering the estate. Only by focusing on the claims, issues, and defenses that arise from a common nucleus of operative facts that were or could have been considered in the bankruptcy case, whether as part of the bankruptcy court's core or "related to" jurisdiction, can res

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[7] Because bankruptcy strives to resolve numerous issues relating to stakeholders in a single forum, there is an "important interest in the finality of judgments in a bankruptcy case." *In re Baudoin*, 981 F.2d at 739-40. Res judicata, which fosters the establishment of certainty in legal relations (*Comm'r v. Sunnen*, 333 U.S. 591, 595 (1948)), is particularly important to effectuate a final resolution of all claims and liabilities among the various parties in bankruptcy cases. *Crop-Maker Soil Servs., Inc. v. Fairmount State Bank*, 881 F.2d 436, 439 (7th Cir. 1989); *see also In re Baudoin*, 981 F.2d at 740 (spiraling litigation costs and increasingly congested courts make it imperative that the doctrine of res judicata be applied with "unceasing vigilance").

judicata be applied to permit the bankruptcy court to resolve the myriad issues necessary to fully and equitably administer a debtor's estate for the benefit of all parties in interest. The decision of the court of appeals undermines the authority of bankruptcy courts to render, interpret, and enforce their orders in a manner that fosters reliance on the judicial process and the rehabilitation of debtors in bankruptcy.

The issues presented here are important to federal bankruptcy practice. The triangular relationship among Wolf, Kodak, and Wachovia, and the need to resolve disputes arising from such relationships, is commonplace in bankruptcy. Complex capital structures including senior and junior secured debt, unsecured debt, and layers of equity securities are state-of-the-art aspects of corporate finance.[8] Disputes among these various constituencies are inevitable as each tier fights for a larger piece of an inadequate pie. The ability of parties to rely on the finality of a bankruptcy court's resolution of liability theories arising from pre-petition agreements and conduct is the *sine qua non* of effective reorganization.

Here, the predicate for the bankruptcy court and district court decisions is simple. Both Kodak and Wachovia filed proofs of claim in the Wolf bankruptcy. Kodak's proof of claim included its $30 million loan to Wolf. Kodak and Wachovia, Wolf's two largest creditors, actively participated in the bankruptcy case. Kodak, however, made tactical choices that conflicted with the bankruptcy court's duty to effectuate an equitable distribution of Wolf's property in accordance with the priorities established under the Bankruptcy Code. Rather than timely challenge Wachovia's enforcement of the Subordination and Intercreditor Agreements in the bankruptcy court, Kodak played fast and loose with the bankruptcy court, participating up to a point that Kodak believed

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[8] *See, e.g., In re Adelphia Commc'ns Corp.*, 336 B.R. 610, 675 n.181 (Bankr. S.D.N.Y. 2006) (231 debtors, 6 prepetition credit facilities, 30 public debt issuances and numerous complex intercreditor disputes).

kept its options open, but then choosing a forum that Kodak presumably believed would be more favorably disposed to its claims. Regardless of Kodak's tactics, how-ever, the bankruptcy court was required to administer the Wolf case based on the positions taken or not taken by the parties. Thus, the bankruptcy court approved:

- $10 million of new loans from Wachovia to Wolf as a debtor in possession based on a finding that Wachovia's pre-bankruptcy liens and claims were senior to Kodak's under the Subordination Agreement;
- the Ritz Sale, based on a finding that, under the Subordination Agreement, Kodak was sufficiently "out of the money" and, therefore, would be treated as an unsecured creditor without standing to object to a sale of substantially all of Wolf's property;
- asset distributions in accordance with the Subordination Agreement, such that Kodak would receive no payments until Wachovia was paid in full; and
- a Settlement and Chapter 11 Plan relying on the Subordination Agreement, under which Wachovia, as the senior secured creditor, received a distribution ahead of Kodak and agreed to forgo $25 million of the proceeds of its collateral for the benefit of administrative creditors.

I. RES JUDICATA APPLIES TO ALL MATTERS THAT ARISE FROM A COMMON NUCLEUS OF FACTS THAT WERE OR COULD HAVE BEEN RAISED.

The doctrine of res judicata "bars re-litigation not just of those claims which were brought in a prior proceeding, but of 'any other admissible matter' which could have been brought, but wasn't." *Sure-Snap*, 948 F.2d at 873 (quoting *Comm'r v. Sunnen*, 333 U.S. at 597). The preclusive effect of claims

that *could have* been brought in the initial proceeding, but were not, is a critical aspect of res judicata. This requirement discourages tactical silence and fosters the resolution of all claims in a single proceeding. *United States v. Tatum*, 943 F.2d 370, 381 (4th Cir. 1991) (res judicata promotes judicial efficiency and fosters reliance on adjudications by applying to issues that were or could have been raised).

Res judicata applies where the subsequent proceeding is "based on the same cause of action." *CoreStates*, 176 F.3d at 194. In determining whether claims involve "the same cause of action," most courts have adopted the "transactional test" under which the "'critical issue is . . . whether . . . the two actions [are based] on the same nucleus of operative facts.'" *In re Baudoin*, 981 F.2d at 743; *Sure-Snap*, 948 F.2d at 874 (the same transaction, evidence, and factual issues must be involved); *E. Minerals & Chems. Co. v. Mahan*, 225 F.3d 330, 337-38 (3d Cir. 2000); *Prochotsky v. Baker & McKenzie*, 966 F.2d 333, 335 (7th Cir. 1992). The court of appeals departed from this established precedent in at least two respects.

First, the court of appeals compared the *specific relief* sought in each of the bankruptcy proceedings, (*i.e.*, approving bankruptcy financing, asset sales, and a settlement; determining claim priorities; distributing property of the estate; and confirming a Chapter 11 plan) with the legal theories asserted in the N.Y. Action. This is not the correct approach. Rather, res judicata requires an analysis of the commonality of the facts that *were* or *could have been* raised in the bankruptcy (including the N.Y. Adversary Proceeding) and the facts alleged in the N.Y. Action. Had the court of appeals compared the facts alleged by Kodak in the N.Y. Action with the facts that Kodak could have alleged during the bankruptcy case (and that Kodak actually did allege in the N.Y. Adversary Proceeding), it would have found those facts to be *identical*. The Subordination Agreement, which is central to

the N.Y. Action and the N.Y. Adversary Proceeding, was repeatedly found by the bankruptcy court to be valid and enforceable and dispositive of the rights of Wachovia and Kodak with respect to their dealings with Wolf. The bankruptcy court made that finding on at least four separate occasions: (i) in the Financing Order; (ii) in the Sale Order; (iii) in the Settlement Order; and (iv) in the Confirmation Order.

Kodak initially challenged the enforcement of the Subordination Agreement in the bankruptcy case by seeking equitable subordination or damages against Wachovia. The same facts are alleged to support the N.Y. Action. It was Kodak's choice to drop its claim for equitable subordination as well as its objections to the enforceability of the Subordination and Intercreditor Agreements. The court of appeals' deference to Kodak's tactical decisions as a dispositive factor in determining the applicability of res judicata is not only at odds with what actually occurred during the bankruptcy case, but conflicts with other circuits that reject such tactics. These courts correctly focus on the logical nexus between the common factual circumstances underlying the claims, such that the facts *could have* or *should have* been raised. *CoreStates*, 176 F.3d at 194, 206; *Sure-Snap*, 948 F.2d at 875 ("[A] party may not avoid the preclusive affect of res judicata by asserting a new theory or a different remedy."); *Prochotsky*, 966 F.2d at 335 (facts, not claims for relief or theories of recovery, determine whether the cause of action is the same); *E. Minerals & Chems. Co.*, 225 F.3d at 337-38 (res judicata applies where "the factual underpinnings, theory of the case, and relief sought against the parties to the proceeding are so close to a claim actually litigated in the bankruptcy that it would be unreasonable not to have brought them both at the same time in the bankruptcy forum").

This point can be illustrated with some specific examples. In *Sure-Snap*, 948 F.2d at 876, during the bankruptcy case, the debtors challenged their lenders' liens on the ground that

the lenders were not legally authorized to lend money. The objections were overruled. Following confirmation of the plan, the reorganized debtors commenced a separate action against the lenders seeking damages arising from alleged breaches of the pre-petition loan agreements. The Second Circuit barred the sub-sequent action, even though, as the court explained, the debtors technically were not asking to change anything the bankruptcy court had done:

> Sure-Snap is not technically asking the district court to disturb the bankruptcy court's finding with respect to the validity of the liens. Thus, it would not necessarily be inconsistent with the bankruptcy court's finding that these liens were valid, for the district court now to find the banks liable in tort to Sure-Snap for their conduct in administering the loans. But appellants' failure to raise these claims (if valid) when they should have, almost certainly affected that prior judgment. Had the bankruptcy court found merit in appellants' lender liability claims, it probably would have structured a different disposition of Sure-Snap's assets or schedule of payments. The court might also conceivably have used its powers under 11 U.S.C. § 510 to "subordinate for purposes of distribution all or part of [the banks'] allowed claim[s]."

This is precisely what occurred here. Kodak had ample opportunity to seek equitable subordination of Wachovia's claims or otherwise to challenge Wachovia's conduct under the Subordination and Intercreditor Agreements. Kodak's decision to lie in the weeds while important and irreversible decisions were being made by the parties and the bankruptcy court is exactly the sort of tactic that res judicata is intended to prevent.

Similarly, in *CoreStates*, 176 F.3d at 200, 206-07, CoreStates Bank was barred by res judicata from pursuing direct claims against another creditor under a subordination agreement, after the bankruptcy court approved a payment to the

junior creditor and overruled CoreStates' objection to such payment based on a legal theory that did not refer to the subordination agreement. The court explained:

> CoreStates and Huls contested at length the fairness of the Reorganization Plan to the extent it provided for the payment of $600,000 to Huls. CoreStates's present claim concerns who is ultimately entitled to receive this same money. . . . UCT paid Huls the $600,000, and CoreStates was aware of and objected to this payment, before the bankruptcy confirmation proceeding ended in a final confirmation of the Plan over CoreStates's objection. Thus, CoreStates could have brought its claim as an ancillary to the confirmation proceeding.

The Fifth Circuit faced a similar issue in *In re Baudoin*, 981 F.2d at 736, holding that a determination of the amount of a secured lender's claim for purposes of bidding during a bankruptcy sale of the debtor's property precluded a separate action for damages against the lender based on the pre-petition conduct of the lender in connection with the same transaction that gave rise to the claim in the bankruptcy cases. The court reasoned that the facts underlying the damage action against the lender would have constituted a defense to the allowance of the lender's claim in the bankruptcy and therefore could and should have been raised in that proceeding. *See also Secon Serv. Sys., Inc.*, 855 F.2d at 410 (adjudication of a lender's secured claims in the bankruptcy case would preclude subsequent fraud claim, which could have been asserted as a defense).

By contrast, the court of appeals here disregarded the commonality of facts and circumstances between the bankruptcy case and the N.Y. Action. All of Kodak's allegations are based on the same triangular debtor-creditor relationship in existence before the bankruptcy. That relationship eventually led to Wolf's bankruptcy and required the bankruptcy court to sort out the claims of the parties. Wolf, Wachovia, and the

bankruptcy court took action based on the validity and enforceability of the Subordination Agreement. As part of the bankruptcy case, Kodak's claims could have been considered as claims, defenses, offsets, or counterclaims to the enforceability of the Subordination and Intercreditor Agreements, which (if Kodak's claims had any merit) would have directly affected the outcome of the bankruptcy case by altering Wachovia's and Kodak's priorities. Indeed, the absence of any such assertions by Kodak was an integral part of the bankruptcy court's determinations as to the relative priorities of Kodak and Wachovia under the Intercreditor and Subordination Agreements. The court of appeals' decision improperly encourages creditors to remain tactically silent while parties and the bankruptcy court finally resolve issues necessary to the administration of the bankruptcy case.

II. THE ELEVENTH CIRCUIT ERRED IN LIMITING ITS FOCUS TO THE RELIEF THAT THE BANKRUPTCY COURT COULD HAVE AWARDED IN THE EXERCISE OF ITS CORE JURISDICTION.

The application of res judicata presupposes the existence of a court of competent jurisdiction to adjudicate the claim of a party against whom it is asserted. *Marrese v. American Academy of Orthopedic Surgeons*, 470 U.S. 373, 382-83 (1985) (adopting § 26 of the Restatement (Second) of Judgments). In *Marrese*, plaintiffs filed an action in state court asserting common law claims. Following dismissal of the complaint for failure to state a cause of action, plaintiffs commenced an action in federal court, alleging violation of § 1 of the Sherman Act. This Court held that the state court action did not preclude plaintiffs' federal antitrust claim, because the state court had no jurisdiction to consider "a cause of action within the exclusive jurisdiction of federal courts." *Id.* at 382. Thus, if the plaintiff could not obtain full relief because the original court lacked subject matter juris-

diction over the plaintiff's claims, or if the procedural rules of the court made it impossible to raise the claims, the plaintiff would not be precluded from commencing another action.

The court of appeals in this case erroneously held that res judicata depends on whether the bankruptcy court alone could have awarded Kodak the monetary relief it was seeking. This was error in two respects. First, the court of appeals disregarded the fact that, if Kodak had prevailed on its equitable subordination claim, it could have been made whole through Wachovia's distributions in the bankruptcy case. Second, and more fundamentally, the court of appeals erred in assuming that the applicability of res judicata should be measured exclusively by the relief that the bankruptcy court alone could award, rather than the relief that could be obtained in the bankruptcy case from the bankruptcy court and its supervising district court acting together. In this respect, the court of appeals is directly at odds with at least two other circuits, which properly focus on the relief that the bankruptcy system, taken as a whole, could provide.

In *Crop-Maker Soil Servs.*, 881 F.2d at 440, for example, one of the debtor's suppliers commenced an action against the debtor for balances due and challenged the senior secured lending agreement. The district court required any non-parties that wished to assert claims "related to" the litigation to file a motion to intervene. A junior secured lender who chose not to participate in a settlement was precluded by res judicata from commencing a separate action directly against the senior lender. The court explained:

> Public policy supports res judicata generally, but in the bankruptcy context in particular. There obviously were practical reasons for Crop-Maker's choice of separate suit in federal district court, rather than using the bankruptcy proceeding, as its forum for challenging Fairmount Bank's moves. As a general creditor struggling for scarce bankruptcy assets, Crop-Maker had limited

> chance of recovery. On the other hand, a fraud action against Fairmount Bank appeared far more promising. But that promising fraud option was properly foreclosed by res judicata because the bankruptcy court was the proper forum . . . .

The Third Circuit reached a similar result in *CoreStates*, 176 F.3d at 198. It explicitly distinguished the situation in *Marrese* and the limitations on res judicata addressed in the Restatement of Judgments § 26 and the accompanying comments:

> We think the exceptions set forth in section 26(1)(c) of the Restatement are inapplicable to the case at bar. A bankruptcy judge's jurisdiction over a non-core "related" claim is not limited in the sense of that section. Section 26(1)(c) applies to limitations on the types of theories, remedies, or relief available if a claim is brought in a particular forum. But bringing a non-core "related" claim before a bankruptcy judge does not in any way limit the available theories, remedies or relief. *A bankruptcy judge is perfectly capable of recommending, and the district court of awarding, judgment based on any theory, remedy, or relief, just as if the claim had been brought originally before a district court, or even a state court of general jurisdiction, outside of a bankruptcy proceeding.* (citations omitted) (emphasis added).

Had Kodak litigated its claims during the bankruptcy case and prevailed, the result would have had a res judicata effect against Wachovia, and Kodak could have obtained whatever relief was appropriate against Wachovia, either in the district court having jurisdiction over the bankruptcy case, or in any other state or federal court having jurisdiction. Kodak's tactical choices cannot preclude the application of res judicata.

The Second, Third, Sixth, Ninth, and Tenth Circuits have held that the application of res judicata to bankruptcy court orders does not turn on whether the bankruptcy court was exercising its core or "related to" jurisdiction. Such orders

are to be given preclusive effect for theories of relief that *were or could have been* raised during the bankruptcy case. *Plotner,* 224 F.3d at 1173 (following the Second, Sixth and Ninth Circuits, holding that res judicata applies in non-core bankruptcy proceedings); *CoreStates*, 176 F.3d at 199 (Third Circuit joining the Second, Sixth, and Ninth Circuits); *In re Int'l Nutronics, Inc.*, 28 F.3d at 970 (non-core claim has res judicata effect since final decision will take place in district court); *Sanders Confectionary Prods., Inc.,* 973 F.2d at 482-83 (same); *Sure-Snap*, 948 F.2d at 873 (same).[9]

The common thread among the Second, Third, Sixth, Ninth, and Tenth Circuits, is the recognition that bankruptcy courts are an arm of the district courts and have been granted broad jurisdiction over core and "related to" matters to effectuate a global resolution of pre-petition claims and causes of action that arise in or under the Bankruptcy Code or that implicate the administration of the bankruptcy case. The artificial distinction created by the Eleventh Circuit—based on whether the bankruptcy court alone could afford "full relief"—threatens a resurrection of pre-*Marathon*[10] jurisdictional uncertainty that paralyzed bankruptcy courts.

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[9] By contrast, the Fifth and Seventh Circuits have held that a bankruptcy court's order in a core proceeding does not preclude the subsequent litigation of a non-core related matter. *Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183, 185 (5th Cir. 1990); *Barnett v. Stearn,* 909 F.2d 973, 979 (7th Cir. 1990). The court of appeals here declared that it was not deciding this issue, but its focus on whether Kodak could have obtained "full relief" in the bankruptcy court was merely a surrogate for the same point. Kodak could have obtained whatever relief (if any) may have been appropriate against Wachovia from the bankruptcy court and the district court having jurisdiction over the bankruptcy.

[10] *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

CONCLUSION

This petition presents the Court with an opportunity to clarify the application of res judicata in bankruptcy cases and to provide uniformity among the circuits with respect to the jurisdiction of bankruptcy courts to bind all parties in interest in bankruptcy proceedings.

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 16, 2006

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 05-12327

IN RE: ATLANTA RETAIL, INC., F.K.A. WOLF CAMERA, INC.,
DEBTOR.EASTMAN KODAK COMPANY,
Plaintiff-Appellant,

v.

ATLANTA RETAIL, INC., F.K.A. WOLF CAMERA, INC., ETC.
WACHOVIA BANK, NATIONAL ASSOCIATION,
Defendants-Appellees.

July 18, 2006

Before BIRCH and CARNES, Circuit Judges, and TRAGER [1], *District Judge.*

TRAGER, *District Judge*:

This appeal raises the question: under what circumstances will a creditor be ***1280** barred from later bringing an action against a co-creditor based upon state law claims if, during the pendency of a bankruptcy, it failed to raise such claims.

Defendant-appellant Eastman Kodak Company ("Kodak") appeals the decision of the United States District Court for the Northern District of Georgia, which affirmed an August 22, 2003 order of the Bankruptcy Court. That order enjoined Kodak from continuing to seek relief against Wachovia Bank f/k/a First Union National Bank ("Wachovia") in the United

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[1] Honorable David G. Trager, United States District Judge for the Eastern District of New York sitting by designation.

States District Court for the Western District of New York for violations of state law ("New York action"). The bankruptcy court held, and the district court affirmed, that Kodak was precluded from bringing the New York action by the doctrine of res judicata as a result of orders issued by the bankruptcy court in a bankruptcy filed by Atlanta Retail, Inc., f/k/a Wolf Camera, Inc., et al. ("Wolf" and "Wolf bankruptcy").

We hold that res judicata does not bar the New York action because Kodak could not have received a full remedy in the contested Wolf bankruptcy proceedings and because the same nucleus of operative fact was not presented in the two actions.

Moreover, res judicata does not require a creditor to raise an independent state law claim against a co-creditor in an adversary bankruptcy proceeding unless the resolution of that claim explicitly becomes an essential part of the bankruptcy plan.

Here, Kodak's claim against Wachovia in no way impacted on the confirmation of the Wolf bankruptcy plan. Accordingly, the judgment of the district court is reversed and the injunction is vacated.

Background

(1)

Kodak had a long-standing business relationship with Wolf, supplying film and other photography-related goods. In the 1990's Kodak provided financing as secured lender to enable Wolf to expand, thereby increasing Kodak's sales.

In September 1998, Kodak and Wachovia, which acted as another secured lender to Wolf, entered into an agreement ("the Subordination Agreement") under which Kodak's loans were subordinated to Wolf's other secured creditors including Wachovia ("pre-petition lenders"). At the same time, Wachovia and Kodak made a separate agreement ("the Intercreditor Agreement") to use their best efforts to promptly

notify each other of occurrences "which may significantly affect the other Secured Creditor with regard to the ability of [Wolf] to meet its obligations . . . ."

In late 1999 Kodak began discussions with Wolf about an additional $30 million loan for a further expansion of the business. Like Kodak's other loans, it was contemplated that this new loan was also to be subordinated to the loans of the other pre-petition lenders. In its pleadings in the New York action, Kodak alleges that Wachovia was aware of these negotiations and their stated purpose and, indeed, that it encouraged the loan. However, Wachovia did so without disclosing its plan that Wolf would use the money to meet its financial obligations to Wachovia.

Kodak also claims that it was not aware at the time that Wolf was nearing a breach of its financial obligations with Wachovia and the other pre-petition lenders. Kodak alleges that on March 2, 2000, Wachovia and Wolf's other pre-petition lenders entered into an agreement with Wolf under which Wolf's covenant defaults would be forestalled until the Kodak loan was completed, unless Wolf failed to receive the loan by April 2000, at which point the defaults would accrue. Kodak further alleges ***1281** that it was never informed of this agreement as well-as required by the Intercreditor Agreement-and only became aware of the alleged breach of the Intercreditor Agreement during the pendency of the bankruptcy. Wachovia did not share this information, Kodak alleges, because Wachovia knew that Kodak would never have loaned the money to Wolf for the purpose of paying Wachovia's loan, rather than for expansion purposes.

In March 2000, Kodak did make the $30,000,000 loan to Wolf with the express condition that the loan fund the development of Wolf's business. Included in the loan agreement was the following clause:

> Wolf covenants to Kodak that it will use the proceeds of the New Term Loan to fund new photo retail store development, new photo retail store acquisitions and upgrading the capability of existing and acquired photo retail stores.

(Second Am. and Restated Loan and Purchase Agreement, dated Mar. 14, 2000, between Kodak and Wolf, ¶ 3.3).

On March 28, 2000, the money was transferred from Kodak to Wolf. On the same day, in accordance with the alleged secret agreement between Wolf and the pre-petition lenders, the money was transferred again, this time to Wachovia and the other pre-petition lenders in order to pay some of Wolf's debts. It appears to be undisputed that none of the money was used to finance an expansion of the business as contemplated in the loan agreement.

On June 21, 2001, Wolf voluntarily filed for Chapter 11 bankruptcy. On the same date, Wolf also filed an emergency debtor in possession motion ("DIP Motion"), requesting permission to receive financing from Wachovia and the other pre-petition lenders in the amount of $10,000,000, permission to continue to use the cash collateral from the loans from the pre-petition lenders, and for the court to provide protection to the pre-petition lenders. Kodak did not file an objection to this motion, but the Official Committee of Unsecured Creditors ("Unsecured Creditors") did object. Thereafter, Wachovia filed proofs of claim and included both the Subordination Agreement and the Intercreditor Agreement as evidence that Kodak's claims were subordinate to those of the pre-petition lenders.

The bankruptcy court granted the DIP motion ("Final Order"). Wolf borrowed approximately $8,000,000 from Wachovia and the other pre-petition lenders. The court granted this loan first priority, and also granted a superior security interest to the pre-petition lenders compared to the

remainder of Wolf's creditors, which included Kodak. Wolf owed these pre-petition secured creditors approximately $77,600,000 in addition to the amount it owed Kodak.

On August 23, 2001, Wolf filed a motion seeking approval for Ritz Camera Centers, Inc. ("Ritz") to purchase nearly all of Wolf's assets ("Sale Motion"). Approximately a month later on September 13, 2001, Wolf and Wachovia filed an Amended Joint Motion to Approve Stipulation with Respect to Distribution of Proceeds from Sale of Assets of Debtors ("Stipulation Motion"). The Unsecured Creditors objected to both the Sale and Stipulation Motions. Kodak only opposed the Sale Motion.

Kodak did not object to the fact that its claims were subordinate to the pre-petition lenders. Instead Kodak argued that Wolf could not sell its assets to Ritz "free and clear" of its liens. *See* 11 U.S.C. § 363(f)(3). Kodak argued that because the proposed sale price of $84,700,000 could not cover the combined claims of Wachovia and Kodak that the sale could not be considered free and clear if the *1282 statute was read to require the repayment of the face value of all liens rather than their market value. The bankruptcy court rejected this argument, holding that Kodak waived its right to object to the sale in the Intercreditor Agreement.

The bankruptcy court also rejected Kodak's legal argument holding that the market determined the value of the liens. As Kodak's claims were subordinate and there were insufficient funds to pay the priority claims, the bankruptcy court found that Kodak's claims were in fact valueless.

In addition, the bankruptcy court also found against the Unsecured Creditors and granted the Stipulation Motion ("Stipulation Order"). It also gave permission for the sale ("Sale Order"). Under the Sale Order, the proceeds of the sale were distributed first to the post-petition lenders, then $20,000,000 for pre-petition debts, and then $25,000,000 for

administrative expenses, with any balance to the remainder of the pre-petition debts.

After the sale, which was approved by the bankruptcy court on September 21, 2001, the Unsecured Creditors filed an adversary action challenging Wachovia's and the other pre-petition lenders' claims, arguing that certain of their liens in Wolf's assets were not perfected. Kodak did not take part in this action. Rather, Kodak filed one of its own in the United States Bankruptcy Court for the Western District of New York. Kodak filed this proceeding against Wachovia alone, arguing that Wachovia and the other pre-petition lenders' claims should be equitably subordinated to Kodak's claims. It also filed claims for breach of contract, fraud and tortious interference with a contract. All of these claims were based on Kodak's claim that it was fraudulently induced by the pre-petition lenders to provide the $30,000,000 loan to Wolf even though they knew, and so contracted with Wolf, that the loan would be used to pay their loans rather than for the contemplated expansion. Wachovia and the pre-petition lenders filed a motion to dismiss.

In the meantime, the Unsecured Lenders, Wolf and the pre-petition lenders had agreed on the terms of a settlement of the Unsecured Lenders' adversary proceeding. A motion was filed under Rule 9019 of the Federal Rules of Bankruptcy Procedure for approval of this settlement. Kodak made a limited objection to this motion, but did not object to the settlement itself. Kodak only objected "to the extent the language of the Stipulation could be construed as barring any and all claims against the Pre-Petition Lenders, including claims held by third parties independent of the Debtors or their estates[.]"

At the July 16, 2002 hearing on the Rule 9019 motion the debtor argued that all questions of subordination, including Kodak's adversary proceeding, had to be resolved in the bankruptcy court in order for the settlement to stand. Kodak

did not use this forum to raise the allegations it made in the New York action. It did argue that the fraud claims in the New York action were based on newly discovered evidence that had not been available at the time of the earlier orders. The bankruptcy court granted the Rule 9019 motion, approving the settlement ("Settlement Order").

After this hearing, on August 2, 2002, rather than responding to Wachovia's motion to dismiss the case in the Bankruptcy Court for the Western District of New York, Kodak voluntarily dismissed the action. On the same day, Kodak filed a new case ("New York action") in the New York Supreme Court, alleging the same state law claims as in its prior suit, but excluding the equitable subordination claim. On Wachovia's motion, the case was removed ***1283** to the U.S. District Court for the Western District of New York on diversity grounds.

Wolf filed its Disclosure Statement and Plan of Liquidation on August 30, 2002. The bankruptcy court endorsed the plan on January 7, 2003. The plan did confirm that Kodak's loans were subordinate to the pre-petition lenders. However, the plan did not prohibit any suits against third parties-only against the debtor.

Although the record provided does not show the specific amounts that each party received, it is undisputed that Kodak did not receive any portion of its $30 million loan from the distribution. While Wachovia and the other pre-petition creditors did receive some amount (at oral argument an estimate of $23 million was suggested), there is no question that Wachovia's recovery was less than the total amount owed to Kodak. Therefore, even if Kodak had taken Wachovia's place through equitable subordination, it would not have received the full amount sought in the New York action.

(2)

On October 11, 2002, Wolf and Wachovia filed suit against Kodak in the Georgia bankruptcy court seeking an injunction against Kodak's New York action on the basis of res judicata and-a now abandoned argument-of collateral estoppel. The bankruptcy court entered an order barring the suit on the basis of res judicata on August 22, 2003.

The bankruptcy court rejected Kodak's argument that the New York action was only an intercreditor dispute and instead focused on the contractual relationships between Kodak, Wachovia and Wolf. It framed the New York action as an attack on its previous orders and an attempt to make the Subordination Agreement unenforceable. The bankruptcy court stated that the Subordination Agreement was found enforceable "in the process of determining the validity, extent and priority of the claims against the Debtors." *In re Atlanta Retail, Inc.*, 297 B.R. 299, 305 (Bankr.N.D.Ga.2003). The bankruptcy court identified the orders approving the sale of Wolf to Ritz, the order approving the Rule 9019 motion, and the order approving the final plan of liquidation as the prior orders, as having a preclusive effect. *Id.* The order was affirmed by the U.S. District Court for the Northern District of Georgia. *Eastman Kodak Co. v. Atlanta Retail, Inc. et al.*, 03-cv-3269 (N.D.Ga. March 25, 2005).

In appealing this order, Kodak makes five arguments, only three of which need be addressed.[2] First, Kodak argues that

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[2] Kodak also argues that the bankruptcy court should not have granted the injunction because res judicata should have been raised as an affirmative defense before the state court. *See Alabama v. United States Army Corps of Engineers*, 424 F.3d 1117 (11th Cir.2005), *cert. denied*, --- U.S. ----, 126 S.Ct. 2862, --- L.Ed.2d ---- (2006) (limiting the court's powers under the All Writs Act). Since we now decide that the bankruptcy and district courts' decision to enjoin Kodak's state law claim should be reversed, there is no need to address Kodak's alternative argument that the defense of res judicata would have been more properly raised before the

this is not the same " cause of action" because the bankruptcy court did not consider the evidence relevant to its state law claim; in particular, Wachovia's withholding of information about the revision of its debt agreement with Kodak. Kodak relies on this court's decision in *Kaiser Aerospace & Elec. Corp. v. Teledyne Indus., Inc. (In re Piper Aircraft Corp.)*, 244 F.3d 1289, 1297-1301 (11th Cir.2001) for this point, arguing that the bankruptcy and district courts did not properly apply the ***1284** case. Kodak argues that the bankruptcy court did not, and was not required, to consider whether a breach of contract between the two lenders had occurred when it made its rulings and, therefore, *Kaiser* is controlling.

Second, Kodak argues that it could not have brought its state claims against Wachovia in the bankruptcy court because its breach of contract was not "related to" the underlying bankruptcy claim-the resolution of Wolf's estate. Therefore, the bankruptcy court lacked jurisdiction to hear the case.

Third, again relying on *Kaiser,* Kodak argued that it lacked an adequate procedural vehicle to bring the state breach of contract claim before the bankruptcy court. 244 F.3d at 1303-04. Kodak further claims that all of the bankruptcy court's orders were issued on contested matters rather than as adversary proceedings. Kodak argues that because the procedural framework for each type of proceeding is different, the orders issued as contested matters could not preclude Kodak's claims, which would have had to have been raised as adversary proceedings. *Kaiser,* 244 F.3d at 1304.

In response, Wachovia agrees with Kodak that *Kaiser* is controlling, but focus on its differences from the case at hand. In particular, it cites the contractual relationships between

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state court. Kodak further argues that the "same party" requirement of res judicata was not met because Kodak never filed an action directly against Wachovia. *See* discussion *infra* note 3.

Kodak, Wachovia and Wolf in comparison to the absence of any relationship between Kaiser and the debtor in the Piper bankruptcy. Wachovia argues that this court in *Kaiser* relied on this lack of any relationship between the debtor and the plaintiff in finding that Kaiser did not have standing to raise the contested claims in the bankruptcy proceeding. Wachovia argues that, here, the district court was correct in finding that Kodak was sufficiently involved and the contractual relationships were sufficiently discussed in the bankruptcy that Kodak was required to bring its state law claims during the bankruptcy. It also argues that the fact that Kodak originally filed its case as an adversary action in the Western District of New York was essentially an admission that the case could be tried before a bankruptcy court.

Wachovia further argues that the bankruptcy court's orders were final orders deserving of the application of res judicata. It argues that Kodak could have raised its objections during the course of the litigation of these orders and its tactical refusal to raise its fraud claim does not protect it from the effects of res judicata. Wachovia further argues that the bankruptcy court properly exercised its discretion in granting the injunction.

Lastly, Wachovia asks the court to rely on equitable and judicial estoppel to enjoin the action if the lower court is not upheld.

Discussion

(I)

Res Judicata

[1][2][3][4][5] Res judicata, or more properly claim preclusion, is a judicially made doctrine with the purpose of both giving finality to parties who have already litigated a claim and promoting judicial economy; it bars claims that could have been litigated as well. *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326, 99 S.Ct. 645, 58 L.Ed.2d 552

(1979). Questions of law raised by the application of res judicata are reviewed de novo. *Kaiser Aerospace & Elec. Corp. v. Teledyne Indus., Inc. (In re Piper Aircraft Corp.),* 244 F.3d 1289, 1295 (11th Cir.2001) (applying de novo review to a bankruptcy court's decision based on res judicata); *In re Justice Oaks II, Ltd.,* 898 F.2d 1544, 1550 (11th Cir.1990). In order to establish that a case is barred under the doctrine of res judicata, this court has held that all ***1285** four of the following elements must be present:

First, the prior judgment must be valid in that it was rendered by a court of competent jurisdiction and in accordance with the requirements of due process. Second the judgment must be final and on the merits. Third, there must be identity of both parties or their privies. Fourth, the later proceeding must involve the same cause of action as involved in the earlier proceeding.

In re Justice Oaks II, 898 F.2d at 1550 (internal citations omitted). "When all of the requirements of claim preclusion are satisfied, 'the judgment or decree upon the merits in the first case is an absolute bar to the subsequent action or suit between the same parties . . . not only in respect of every matter which was actually offered and received to sustain the demand, but also as to every [claim] which might have been presented.'" *Justice Oaks II,* 898 F.2d at 1552 (quoting *Baltimore S.S. Co. v. Phillips,* 274 U.S. 316, 319, 47 S.Ct. 600, 602, 71 L.Ed. 1069 (1927)).

As in *Kaiser,* there is no real question that the bankruptcy court was a court of competent jurisdiction[3] and that, at the very least, its confirmation order was final and on the merits. *See Justice Oaks II,* 898 F.2d at 1549 (finding order

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[3] Wachovia argues that Kodak challenged the jurisdiction of the bankruptcy court in its brief. It did not. Rather, Kodak addressed a separate issue: whether it could have brought the claim before the bankruptcy court. This issue is discussed below.

endorsing confirmation plan final, but order confirming settlement not to be final and on the merits). However, it is clear that res judicata does not apply because at least two of the elements are lacking here.[4] Kodak could not have received full relief in the first action, and the contested bankruptcy proceeding and the state court claim do not involve the same nucleus of operative fact or "transaction or occurrence." *See Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1239, n. 8 (11th Cir.1999) (applying a transactional approach to determining the nucleus of operative fact in each action), *citing* Restatement (Second) of Judgments § 24.

a. Res Judicata and the Availability of Relief in Contested Proceedings

[6] Under the most basic principles of res judicata, Kodak did not have to sue Wachovia in a forum where it could not receive full relief. *Kaiser*, 244 F.3d at 1303; *see also* Restatement (Second) of Judgments § 26(1)(c). Wachovia has argued that Kodak could have raised its claims regarding Wachovia's alleged fraud in the context of one of the five contested proceedings before the bankruptcy court by challenging the enforcement of the Subordination Agreement. It urges that the bankruptcy court could have decided to grant equitable subordination of Kodak's claim at any point while considering these motions. This argument fails here because Kodak could not have received its full requested relief under any of these orders.

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[4] As previously mentioned Kodak argues that the identity of parties requirement is also lacking. Kodak challenges the district court's characterization of the claims among the creditors as interpleader suits. Rather, Kodak argues, its claim against co-creditor Wachovia more properly should be analogized to a permissive cross claim rather than a compulsory counterclaim. As we conclude that res judicata is not applicable on other bases, there is no need to discuss this point.

As in *Kaiser,* it is not clear that Kodak's challenge to any of the orders would have resulted in any additional benefit to Kodak. Thus, in *Kaiser,* it was found that the plaintiff did not have to raise objections ***1286** to the bankruptcy plan's confirmation because, even if successful, the objections would only have resulted in defeating the confirmation, not providing the relief Kaiser sought under state law. 244 F.3d at 1303. Likewise, here, if Kodak had challenged any of the five motions, it would have done Kodak little good. The result would only be their denial, not the equitable subordination of Wachovia's claims to Kodak.

In each of the five orders, either the relief was not available within the context of the claims, or the contested proceeding was not the appropriate procedural device to achieve any kind of relief. The Settlement Order, which approved the final resolution of the Unsecured Creditor's claims, did not touch upon Kodak's claims and specifically stated that it did not resolve the claims in the New York action. The four remaining orders, the Final Order (confirming the DIP plan), the Sale and Stipulation Orders (endorsing the sale to Ritz and the division of profits) and the final confirmation order, did endorse the Subordination Agreement by setting the priority of the lenders. As Kodak does not challenge the validity or enforcement of the Subordination Agreement itself, but instead alleges a violation of it, the only conceivable means for Kodak to receive relief under these orders would be to seek equitable subordination of the parties.[5] However, in order to receive such relief, a party

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[5] Wachovia now argues that the bankruptcy court determined that the Subordination Agreement could not be further contested. This is not at all clear from the record. The bankruptcy judge stated:

So any effect of the order, as I read this stipulation, I'm not making any comment about the suit . . . in Rochester. I'm not making any comment about whether the venue was appropriate. I'm not making any comment about whether it's timely.

must file an adversary proceeding unless the plan itself provides for subordination. Fed. R. Bankr.P. 7001(8). The plan here did not allow for subordination. Therefore, filing objections at the contested proceedings would not have provided Kodak with the requested relief.

More significantly, even if equitable subordination were available, the amount Wachovia received from the bankruptcy would not be sufficient to meet Kodak's losses. When Kodak filed suit, all of the pre-petition lenders had only received $21.7 million. Wachovia was only entitled to a fraction of this amount. Although the full record of the current distribution amount is not before this court, both sides conceded in oral argument that the total amount that Wachovia itself received from the bankruptcy as one of the many pre-petition lenders was not sufficient to satisfy Kodak's claim. In other words, even if Kodak had taken Wachovia's place in the bankruptcy through equitable subordination, its claim against Wachovia would not have been satisfied.

[7] In addition, not only would Kodak not be made whole by equitable subordination of Wachovia's claims, Kodak also could not have been granted state law damages in the context of the contested proceedings. *1287 Any suit Kodak filed to

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It's simply not before the Court this morning. And at some point in time, there's going to be a hearing in Rochester or here, and the Court will . . . hear you out fully . . . in any position with regard to that litigation when it comes before this Court. It may be that [it is heard in Rochester] but that's simply not before the Court this morning.

(RB-874-27, 34 (Tr. 07-16-02)). The Bankruptcy Judge's subsequent order banning the New York action was based more on the argument that Kodak's claims could have been raised during the Wolf bankruptcy. *In re Atlanta Retail, Inc.*, 297 B.R. 299 (Bankr.N.D.Ga.2003). Nevertheless, as stated, the issue is not the validity of the Subordination Agreement, which Kodak does not contest, but whether Wachovia violated it as well as the Intercreditor Agreements.

" recover money or property" against a person other than the debtor would have to be filed as an adversary proceeding, rather than be raised within the context of a contested proceeding. Fed. R. Bankr.P. 7001(1). Here, as in *Kaiser*, "the defeat of the plan . . . would not necessarily have resolved . . . claims for damages-including potential consequential and punitive damages." 244 F.3d at 1303-04. We reach the same conclusion as the court in Kaiser: that objections to the various motions in the contested proceeding context did not provide "an adequate vehicle to assert fully the claims it raises in the state court action." *Id.* The most basic principles of res judicata require that full relief must have been available in the first action in order for the second action to be barred. *See* Restatement (Second) of Judgments § 26(1)(c). Therefore, res judicata cannot apply to the contested matters.

b. Res Judicata and the Adversary Proceedings.

[8] Wachovia argues that, nevertheless, res judicata should apply despite the fact that full relief was not available in the contested proceedings because Kodak could have filed an adversary action within the context of the bankruptcy. Kodak disputes that the bankruptcy court would have had jurisdiction over such an action, claiming that the state law action was not "related to" the bankruptcy. *See* 28 U.S.C. § 157(c)(1). Kodak also claims that preclusion of such claims on the basis of the bankruptcy court's judgment resulting from only a contested proceeding would raise Seventh Amendment concerns.[6]

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[6] Kodak argues that even if the claims were within the court's jurisdiction they would have been non-core proceedings requiring de novo review by a district court. *See* 28 U.S.C. § 157(b)(2). The circuits disagree as to whether a decision in a core contested hearing can ever have a preclusive effect over issues which can only be tried in a non-core adversary proceeding. *See e.g. Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183 (5th Cir.1990) (finding that a bankruptcy court's confirmation

Bankruptcy courts have jurisdiction, by reference from the District Courts, over "all cases under Title 11 and all core proceedings arising under Title 11, or arising in a case under Title 11." 28 U.S.C. § 157(a), 157(b)-(c). Neither party has cited a case in this circuit that indicates that the bankruptcy court would have had jurisdiction over a claim between two creditors when the outcome would not affect the amount of money available in the bankruptcy estate. However, the bankruptcy court would have had jurisdiction over a ***1288** claim for equitable subordination as a core proceeding determining the priority of the liens. 28 U.S.C. § 157(b)(2)(K). If Kodak had brought an equitable subordination claim, it would appear that the bankruptcy court would then have had jurisdiction over the state law claims as claims "related to" the equitable subordination claim, at least where they would directly affect the bankruptcy plan. This issue need not be addressed because the case turns not on whether Kodak

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plan could not preclude a later RICO claim because the bankruptcy court would not have jurisdiction over that claim); *Barnett v. Stern,* 909 F.2d 973 (7th Cir.1990) (holding that the confirmation plan could only preclude a later claim if the later claim were within the bankruptcy court's core jurisdiction and could be heard in a contested proceeding); *compare Sanders Confectionery Products Inc. v. Heller Financial, Inc.,* 973 F.2d 474 (6th Cir.1992), *cert. denied,* 506 U.S. 1079, 113 S.Ct. 1046, 122 L.Ed.2d 355 (1993) (holding that core bankruptcy proceedings can preclude non-core proceedings); *Sure-Snap Corp. v. State Street Bank Trust Co.,* 948 F.2d 869 (2d Cir.1991) (holding that core proceedings can preclude on the basis of res judicata non-core proceedings before the bankruptcy court). This circuit, however, has addressed this issue only in dicta. *See I.A. Durbin v. Jefferson National Bank,* 793 F.2d 1541, 1548 n. 8 (11th Cir.1986) (assuming without deciding that a contempt proceeding had res judicata effect, but noting that if it were non-core, it would have to be reviewed by the district court and "such proposed findings would not be entitled to res judicata effect in subsequent litigation because there would have been no final judgment on the merits"). It is not necessary to reach this issue because, as discussed later, the New York action was not based on the same cause of action as the Wolf bankruptcy and, therefore, res judicata does not apply.

could, but whether it was required to bring an adversary proceeding in the bankruptcy to resolve its state law claims.

[9] Again, assuming the bankruptcy court would have had jurisdiction over the state claims in an adversary proceeding, it does not follow that the New York action would have been precluded. The sweeping limits of jurisdiction do not set the boundaries of res judicata. Wachovia is correct in asserting that res judicata applies not only to claims which were actually brought before the previous court, but also to those claims "which could have been raised in that action." *Kaiser,* 244 F.3d at 1296. However, res judicata only requires a litigant to raise the claims in the first proceeding "if the later litigation arises from the same cause of action." *In re Justice Oaks II,* 898 F.2d at 1550 (internal citations omitted).

Both parties have suggested that we look to the Third Circuit to determine which claims to compare to the second litigation. We do not think that the Third Circuit decisions help Wachovia because as we read the cases the inquiry is narrowed in the context of two creditors in a bankruptcy proceeding to comparing only the claims which were actually brought against a co-creditor to the claims in the later litigation. *See Eastern Minerals & Chemicals Co. v. Mahan,* 225 F.3d 330, 337-38 (3d Cir.2000); *CoreStates Bank, N.A. v. Huls America, Inc.,* 176 F.3d 187, 202 (3d Cir.1999). In any case, in this circuit, we have not narrowed the analysis, instead looking at all the previous bankruptcy orders, regardless of whether there were claims between the creditors during the proceedings leading to those orders. *See Kaiser,* 244 F.3d at 1299-1300; *In re Justice Oaks II,* 898 F.2d at 1551. We follow that approach in this case.

[10] In order to determine whether the two proceedings are based on the same cause of action, the test is whether they "arise[ ] out of the same nucleus of operative fact, or [are] based upon the same factual predicate." *Kaiser,* 244 F.3d at 1297. In order to compare the actions, it is necessary to look

not only at the facts that were before the bankruptcy court, but also the factors which the bankruptcy court was required by statute to consider in making its previous decisions. *Id.* at 1299. This is "'premised on the notion that the bankruptcy court has addressed in the confirmed plan and order only those issues that are *properly* within the scope of the confirmation hearing.' " *Kaiser,* 244 F.3d at 1290, *quoting In re Seidler,* 44 F.3d 945, 948 (11th Cir.1995) (emphasis added in *Kaiser).*

[11] If the evidence crucial to the second action was never raised before the court in the first action, it is "powerful evidence" that the two cases are not based on the same nucleus of operative fact. *Kaiser,* 244 F.3d at 1297. The New York action addresses the facts surrounding negotiation of Kodak's $30 million loan to Wolf. It relies on evidence of Wachovia's alleged bad faith in failing to tell Kodak that it had encouraged Wolf to enter the loan so that it may pay its debts to Wachovia and the other pre-petition lenders. While the Subordination Agreement and the Intercreditor Agreement were before the bankruptcy court, neither Kodak's allegations ***1289** of the breach of the "good faith" clause of the Intercreditor Agreement, nor any evidence in support of these allegations, were ever placed before the bankruptcy court. The two documents were before the bankruptcy court solely for the purpose of establishing the priorities of the creditors. If Wachovia believed the facts alleged in the New York action were relevant, it could have raised them by seeking a declaratory judgment as to those allegations. *See* Fed. R. Bankr. 7004(9). Indeed, as the bankruptcy unfolded, Kodak and Wachovia were not truly adversarial, and their interests, if not aligned, were certainly not in opposition. This, together with the fact that the evidence concerning the state law claims was never raised as a serious issue, is powerful evidence that the claims are not based on the same nucleus of operative fact. *Kaiser,* 244 F.3d at 1297.

As the facts that form the basis of Kodak's New York action were never before the bankruptcy court, we turn to each of the orders and evaluate whether the evidence would have had, as a matter of law, to have been considered by the bankruptcy court in the course of determining the outcome of the orders. *Kaiser,* 244 F.3d at 1299.

The bankruptcy court's first order confirmed the DIP plan at the beginning of the bankruptcy. This plan allowed Wolf to borrow money and continue to use existing cash to run its business. In evaluating whether to allow this plan, the bankruptcy court had to make the determination that the debtor was not able to receive unsecured credit and that the only available credit was from a creditor who insisted on having priority over all other creditors, including administrative expenses. 11 U.S.C. § 364(c)(1); (d)(1). The order also gave a limited schedule for all claims against pre-petition creditors that were in the debtor's interest. The order did not touch upon claims between co-creditors. Clearly, none of the issues before the court in this proceeding required the court to consider the allegations of fraud by one co-creditor (Kodak) against another (Wachovia). Therefore, this order and the New York action are not based on the same nucleus of operative fact; nor do they constitute the same cause of action.

The second order, the Sale Order, held that Wolf could sell its business to Ritz. In determining whether to allow the sale, the bankruptcy court was required to consider whether the sale was fair and agreed to by the secured creditors (11 U.S.C. § 363(b)) and whether the price was greater than the value of Wolf's liens (11 U.S.C. § 363(f)). The court also made a legal ruling that Kodak waived its right to object to the sale in the Intercreditor Agreement. Again, these rulings did not require the evaluation of the alleged fraud by Wachovia prior to the bankruptcy.

The third order, the Sale Proceeds Order, endorsed a stipulation made by the parties as to the distribution of the sale to Ritz. This proposed order did set the priority of who would receive the proceeds of the sale. However, Kodak and the other unsecured lenders were neither parties to nor bound by the stipulation. The rights of unsecured lenders were specifically reserved, subject to the restrictions in the Final Order. Again, none of the determinations in the Sale Proceeds Order required the consideration of the alleged fraud.

The fourth order, the Settlement Order, has already been found not to be a judgment subject to res judicata. *Justice Oaks II,* 898 F.2d at 1549 (holding that the authorization of a settlement is not a final decision on the merits). The only case Wachovia cited to the contrary, ***1290** *Christo v. Padgett,* 223 F.3d 1324, 1339 (11th Cir.2000) , specifically stated that while a settlement could be a final judgment for the purposes of collateral estoppel as to issues pertaining to the confirmation of the settlement, such an order was not final for the purposes of res judicata.

Finally, there is the confirmation order which was a final judgment. *Kaiser,* 244 F.3d at 1299; *Justice Oaks II,* 898 F.2d at 1549-50. In this order, the bankruptcy court made the final determination of the priority of the lenders. In doing so, it was required to consider the factors set out in 11 U.S.C. § 1129(a). *See Kaiser,* 244 F.3d at 1299. This section requires the bankruptcy court to consider the fairness of the plan to all classes of creditors and whether they have either accepted the plan or received a fair benefit from it. *Id.* In making an evaluation of the plan's fairness, the statute did not require and the bankruptcy court would not have been aided in making that evaluation if it had the allegations of Wachovia's fraud before it. The Confirmation Order did set the priorities of the creditors to the remainder of Wolf's assets. However, the confirmation plan itself only purported to resolve the claims against the debtor.

In some cases, confirmation plans have included releases as to third parties and among creditors, to much criticism as potentially violating § 524(e) which states that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such a debt." *See In re Continental Airlines,* 203 F.3d 203, 214 (3d Cir.2000) (rejecting plan that released non-debtors' claims against other non-debtors without consent); *cf. In re Master Mortg. Inv. Fund, Inc.,* 168 B.R. 930 (Bankr.W.D.Mo.1994) (allowing such a release with certain factors including alignment of interests of the released third party and debtor, benefit to the debtor, agreement of the class and substantially complete payout of all claims). Although there was no such release in this case, the bankruptcy court articulated one of the common justifications for allowing them: a reward for creditors such as Wachovia who cooperate with the bankruptcy and accept less than their initial secured loans. *In re Atlanta Retail, Inc.,* 297 B.R. at 307. Here, however, no such release was even contemplated. Wachovia should not receive more repose from the other creditors in the bankruptcy than it would have received through a release, which while legally questionable, would at least have the advantage of providing notice to Kodak. Participation in a bankruptcy cannot relieve a creditor of allegations of its own fraud in another context.

In sum, the same nucleus of operative facts are not present in both cases. The focus of the bankruptcy court, and rightly so, was the equitable distribution of the debtor's funds and the administration of the estate. Its orders did apply the Subordination and Intercreditor Agreements in that Kodak's claims were subordinated to those of Wachovia and the other pre-petition creditors according to those agreements. However, Kodak does not contest the validity or the enforcement of these agreements. Kodak has instead brought an entirely separate fraud claim. The evidence in support of

this fraud claim, Wachovia's alleged inducement of the loan from Kodak to Wolf, was not required to be considered in any of the hearings before the bankruptcy court and was not. Therefore, res judicata does not apply.

(3) Judicial and Equitable Estoppel

[12][13][14] Wachovia's final arguments involve the application of judicial and equitable estoppel. Wachovia cannot expect to receive benefit from the doctrines of judicial***1291** or equitable estoppel. Equitable estoppel provides relief for parties who have been induced into behavior through another party's false representation; judicial estoppel prevents a party from later raising completely unknown claims. *See In re Colarusso,* 280 B.R. 548, 559 (Bankr.Mass.2002); *DeLeon v. Comcar Indus.,* 321 F.3d 1289, 1291 (11th Cir.2003). Here, Kodak did not hide its intention to sue Wachovia under tort law. At the time of the Rule 9019 hearing, Kodak had already filed suit in the Bankruptcy Court for the Western District of New York and argued during the hearing that it had the right to continue its equitable subordination claim. Wachovia had notice of Kodak's claims at the time of the resolution of the bankruptcy. It could have filed for a declaratory judgment to resolve any concerns regarding Kodak's claims but chose not to do so.

Conclusion

Considering that Kodak could not have received full relief in the contested bankruptcy proceedings and the New York action did not have the same nucleus of operative facts as any of the issues raised in the contested proceedings, we reverse the bankruptcy and district court's decision to preclude the New York action on the basis of res judicata and vacate the injunction issued against Kodak proceeding with the New York action.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF
GEORGIA, ATLANTA DIVISION

CIVIL ACTION NO. 1:03-CV-3269-CAP

EASTMAN KODAK COMPANY,
Appellant-Defendant,

v.

ATLANTA RETAIL, INC. f/k/a WOLF CAMERA, INC.; ATLANTA RETAIL SUBSIDIARY, LLC f/k/a WOLFEXPRESS. COM, LLC; ATLANTA RETAIL, L.P. f/k/a/ TEXAS PHOTO FINISH, L.P.; ATLANTA RETAIL PARTNER, INC. f/k/a/ FOX PHOTO PARTNER, INC.; and WACHOVIA BANK, NATIONAL ASSOCIATION,
Appellees-Plaintiffs.

March 25, 2005, Decided
March 25, 2005, Filed

ORDER

This bankruptcy action is before the court on the appeal of Eastman Kodak Company ("Kodak") from the order of the United States Bankruptcy Court for the Northern District of Georgia, dated August 22, 2003, granting the joint motion of Wachovia Bank, f/k/a First Union National Bank ("Wachovia") [*2] and Atlanta Retail, Inc., f/k/a Wolf Camera, Inc., et al. (collectively "Wolf") for summary judgment ("Preclusion Order").

Factual Background

Kodak had been a long-time supplier of photographic film, paper, and chemicals to Wolf, which operated a national chain of full service specialty photo stores. Beginning in the

early 1990s, Kodak provided loans to Wolf to finance the expansion of Wolf's retail stores. Wolf also had a revolving line of credit from Wachovia. Kodak and Wachovia both held security interests in substantially all of Wolf's assets.

In September 1998, Kodak and Wachovia entered into a pair of agreements governing their intercreditor rights regarding Wolf's debts. The first was a subordination agreement ("Subordination Agreement"), under which Kodak's right to repayment of its loans was subordinated to Wachovia's (and the other banks in its syndicate) ("Prepetition Lenders") right to repayment under its credit agreement with Wolf ("Wachovia Credit Agreement").

The second contract was an intercreditor agreement ("Intercreditor Agreement"). Under it, Kodak and Wachovia agreed to use their best efforts to notify each other of any of their actions "which may significantly [*3] affect the other Secured Creditor with regard to the ability of [Wolf] to meet its obligations to the Secured Creditor."

In late 1999, Kodak and Wolf began negotiating an additional $ 30,000,000 investment by Kodak to finance Wolf's expansion efforts. Wolf alleges that it informed Wachovia of these negotiations and that Wachovia encouraged these negotiations. At this time, Wolf's financial condition began to worsen. In February 2000, Wolf informed Wachovia that it was, or soon would be, in violation of certain financial covenants in the Wachovia Credit Agreement. Kodak alleges that, on March 2, 2000, Wachovia and the Prepetition Lenders executed a consent ("Consent Agreement") agreeing to waive temporarily Wolf's covenant defaults until the earlier of the end of April 2000 or the closing of the $ 30,000,000 loan by Kodak. According to Kodak, Wachovia never informed Kodak of Wolf's covenant defaults or of the Consent Agreement's terms, contrary to Wachovia's obligations under the Intercreditor Agreement.

On March 28, 2000, Kodak and Wolf executed an agreement pursuant to which Kodak agreed to loan Wolf $30,000,000 ("Kodak Loan Agreement"). As with prior loans between Wolf and Kodak, [*4] this loan was secured but subordinated to Wachovia's liens. This loan was in addition to the approximate $ 9,000,000 in subordinate loans Kodak had previously extended to Wolf. Kodak conditioned its agreement to loan the money on the requirement that the money disbursed would be used solely to fund the expansion and upgrading of Wolf's retail stores, which was expected to increase the volume of Kodak products that Wolf purchased and marketed.

According to Kodak, unbeknownst to it at the time, Wachovia, the other Prepetition Lenders, and Wolf amended the Wachovia Credit Agreement so that it required Wolf to use the $ 30,000,000 to pay off part of its indebtedness to the Prepetition Lenders. Furthermore, Kodak alleges that Wachovia hid this fact from Kodak, despite the terms of the Intercreditor Agreement.

On March 28, 2000, Kodak disbursed the $ 30,000,000 into an account under Wolf's name at Wachovia. That same day, Wolf transferred all or substantially all of the loan proceeds to the Prepetition Lenders to pay down its indebtedness.

On June 21, 2001, Wolf and its affiliates filed voluntary petitions for relief ("Bankruptcy Proceeding") pursuant to Chapter 11 of Title 11 of the [*5] United States Code ("Bankruptcy Code"). As of the petition date, as evidenced by the proofs of claim, Wolf was indebted to the Prepetition Lenders in the approximate principal amount of $ 77,600,000 ("Prepetition Indebtedness").

Attached to the proofs of claim were documents evidencing the relative priority of the claims and liens of Kodak and Wachovia. Specifically, Wachovia attached the Subordination

and Intercreditor Agreements, the two of which together demonstrated the subordinate status of Kodak's claims and liens against the assets of Wolf to the claims and liens of Wachovia.

Pursuant to an emergency motion dated June 21, 2001 ("DIP Motion"), Wolf sought court authorization to, among other things: 1) obtain DIP (debtor-in-possession) financing up to the principal amount of $ 10,000,000 from Wachovia and other financial institutions ("DIP Lenders"); 2) utilize cash collateral of the Prepetition Lenders; and 3) provide adequate protection to the Prepetition Lenders. The Official Committee of Unsecured Creditors ("Committee") objected to the DIP Motion, but Kodak did not.

The bankruptcy court eventually entered an order approving the DIP financing ("DIP Order"). Pursuant to the [*6] DIP Order, Wolf borrowed over $ 8,000,000 from the DIP Lenders and used cash collateral and other collateral of the Prepetition Lenders. The DIP Order granted the Prepetition Lenders a security interest in and a lien upon substantially all of Wolf's assets, as well as a superpriority claim, junior only to the security interest and debt owing to the DIP Lenders.

Pursuant to a motion dated August 23, 2001 ("Asset Purchase Motion"), Wolf sought an order approving an asset purchase agreement ("Asset Purchase Agreement") between Wolf and Ritz Camera Centers, Inc. ("Ritz"), pursuant to which, Ritz would acquire substantially all of Wolf's assets. On September 13, 2001, Wolf, along with Wachovia, filed an Amended Joint Motion to Approve Stipulation with Respect to Distribution of Proceeds from Sale of Assets of Debtors ("Stipulation Motion"). The Committee and Kodak opposed the Asset Purchase Motion, but only the Committee opposed the Stipulation Motion.

In its objection to the Asset Purchase Motion, Kodak acknowledged the validity and senior status of the claims of the Prepetition Lenders, but contended that the sale violated *section 363(f) of the Bankruptcy Code*. After several days of [*7] hearings, the bankruptcy court overruled the objections and granted both the Asset Purchase Motion ("Sale Order") and the Stipulation Motion ("Stipulation Order"). The bankruptcy court specifically found that the value of the property being sold was less than the aggregate value of Wachovia's lien, rendering Kodak's subordinate claim worthless.

Pursuant to the Stipulation Order, the proceeds of the sale of Wolf's assets to Ritz were distributed as follows: first, to satisfy all outstanding obligations under the DIP financing; second, $20,000,000 to reduce the Prepetition Indebtedness; third, up to the next $25,000,000 to establish the administrative expense fund; and finally the balance to reduce the Prepetition Indebtedness. As additional adequate protection and in consideration for consenting to the use of its cash collateral to pay the administrative expenses, the Prepetition Lenders were granted a first priority claim against the proceeds of any avoidance action recoveries and any surplus remaining in the administrative expense fund after payment of allowed expenses.

On January 28, 2002, the Committee commenced an adversary proceeding against Wachovia ("Committee Adversary [*8] Proceeding") generally seeking a determination of the validity, extent, and priority of the Prepetition Lenders' claims and liens. Kodak did not challenge the interests of any of the Prepetition Lenders at that time. Wachovia, Wolf, and the Committee eventually settled the Committee Adversary Proceeding.

On June 18, 2002, a motion was filed pursuant to *Rule 9019 of the Federal Rules of Bankruptcy Procedure* ("9019 Motion"), seeking approval of the settlement of the

Committee Adversary Proceeding. A hearing on the 9019 Motion was held on July 16, 2002, with appearances by Wolf, the Committee, Wachovia, and Kodak.

Kodak generally supported the 9019 Motion, but filed an objection based on two limited points: 1) that the dismissal of the Committee Adversary Proceeding did not affect the rights of third parties against Wachovia and 2) that the 9019 hearing did not constitute Kodak's opportunity to be heard on the issue of the enforceability of the Subordination Agreement. The bankruptcy court found that Kodak had on several occasions been afforded a full and fair opportunity to be heard on the enforceability of the Subordination Agreement. As a result, the bankruptcy court approved the [*9] 9019 Motion, expressly finding that the Subordination Agreement was enforceable.

After the Committee Adversary Proceeding was settled, but prior to the 9019 hearing, Kodak commenced an adversary proceeding in the United States Bankruptcy Court for the Western District of New York ("New York Adversary Proceeding"). Kodak filed claims for breach of contract, fraud, and tortious interference and also sought the equitable subordination of the claims of the Prepetition Lenders to Kodak's claim against Wolf pursuant to *section 510 of the Bankruptcy Code*. In support of its claims, Kodak alleged that it was misled into extending the $ 30,000,000 loan. Wachovia filed a motion to dismiss the New York Adversary Proceeding; however, before responding to Wachovia's motion, but following the bankruptcy court's approval of the 9019 Motion, Kodak voluntarily dismissed the New York Adversary Proceeding.

Shortly thereafter, Kodak sued Wachovia in the Supreme Court of the State of New York, alleging breach of contract, fraud, and tortious interference with contract ("New York Action"). The complaint filed in the New York Action was substantially identical to the complaint filed in the New York

Adversary [*10] Proceeding, minus the claim for equitable subordination. Wachovia ultimately removed the New York Action to the United States District Court for the Western District of New York.

On August 30, 2002, Wolf filed its disclosure statement ("Disclosure Statement") and liquidation plan of reorganization ("Plan"). The Disclosure Statement provided that the Stipulation Order was "a critical prerequisite to the Plan as the Pre-Petition Bank Group would not be willing to compromise their Claims except as set forth therein." An order confirming Wolf's Plan was entered on January 7, 2003. Kodak did not object to the confirmation of the Plan.

On October 11, 2002, Wachovia and Wolf filed a complaint in the Georgia bankruptcy court that had previously presided over the Bankruptcy Proceeding for injunctive relief, alleging that the New York Action is barred by the doctrines of res judicata and equitable estoppel. On October 16, 2002, Wachovia and Wolf filed a motion for a preliminary injunction ("Preliminary Injunction Motion"). Following a hearing on the Preliminary Injunction Motion, the bankruptcy court entered a consent order granting the motion, as prepared by the parties. Subsequently, Kodak [*11] filed a motion to dismiss and a motion to abstain. The bankruptcy court denied both motions. On January 23, 2003, Wachovia and Wolf filed a motion for summary judgment. The bankruptcy court granted the motion, holding that "the New York Action or any other action with the same nucleus of operative facts, is barred by the doctrine of res judicata" ("Preclusion Order"). Kodak has now appealed that order.

Legal Analysis

I. Standard of Review

The bankruptcy court's findings of law are subject to a de novo review by the district court. See *Coggin v. Coggin (In re Coggin), 30 F.3d 1443, 1452 (11th Cir. 1994).* In reviewing

the decision of the bankruptcy court, however, this court must accept the court's findings of fact unless they are "clearly erroneous." *Id.* The application of res judicata by a bankruptcy court is a determination of law; therefore, such application is reviewed de novo. See *Kaiser Aerospace & Elec. Corp. v. Teledyne Indus. Inc. (In re Piper Aircraft Corp.), 244 F.3d 1289, 1295 (11th Cir. 2001).*

II. Whether Res Judicata Applies in This Instance

The first issue before this court is whether claim [* 12] preclusion, or res judicata, operates in this case to bar Kodak from pursuing the New York Action. The burden is on the party asserting res judicata to demonstrate that the later suit is barred. *Piper, 244 F.2d at 1296.* In order for res judicata to apply, four elements must be satisfied:

> First, the prior judgment must be valid in that it was rendered by a court of competent jurisdiction and in accordance with the requirements of due process. Second, the judgment must be final and on the merits. Third, there must be identity of both parties or their privies. Fourth, the later proceeding must involve the same cause of action as involved in the earlier proceeding.

Wallis v. Justice Oaks II, LTD (In re Justice Oaks II, LTD), 898 F.2d 1544, 1550 (11th Cir. 1990). If these four elements have been satisfied, "[t]he court next determines whether the claim in the new suit was or could have been raised in the prior action; if the answer is yes, res judicata applies." *Piper, 244 F.2d at 1296.* The court will address each of these elements in turn.

1. Whether the Prior Judgment of the Bankruptcy Court Was Valid

As [*13] in Justice Oaks, "the order confirming the plan was entered by a court of competent jurisdiction and in

accordance with due process." *898 F.2d at 1550.* Furthermore, Kodak has never challenged the bankruptcy court's jurisdiction over its previous orders, including confirmation of the Plan, and Kodak acknowledges that "Wachovia is certainly correct that the Bankruptcy Court had core jurisdiction to enter its prior Orders." Reply Br. of Appellant Eastman Kodak Company at 16 (citing Joint Br. of Appellees at 51-55 [Doc. No. 8]) [Doc. No. 3]. Additionally, Kodak does not claim that the bankruptcy court failed to comply with the procedural requirements of the bankruptcy rules or failed to properly conduct any of the hearings at issue, including the confirmation hearing. See *Justice Oaks, 898 F.2d at 1550.* For these reasons, the court holds that the first element is satisfied.

2. Whether the Prior Judgment of the Bankruptcy Court Was Final and on the Merits

A bankruptcy court's confirmation order "is given the same effect as any district court's final judgment on the merits." *Justice Oaks, 898 F.2d at 1550* (citing *Stoll v. Gottlieb, 305 U.S. 165, 170-171, 59 S. Ct. 134, 137, 83 L. Ed. 104 (1938)).* [*14] Accordingly, the confirmation order in this case constitutes a final judgment on the merits; therefore, the court holds that the second element is satisfied.

3. Whether the Bankruptcy Proceeding and the New York Action Involve the Same Parties

Kodak argues that the New York Action does not involve the same parties as the Bankruptcy Proceeding because Kodak did not actually assert any claims against Wolf or Wachovia during the Bankruptcy Proceeding. Kodak makes the argument that Wachovia and Kodak were essentially codefendants to Wolf's Bankruptcy Proceeding; therefore, the claims that Kodak is asserting against Wachovia in the New York Action were permissive cross claims in the Bankruptcy Proceeding. As Kodak points out, "cross claims are always

permissive and a party who decides not to bring his claim under *Fed. R. Civ. P. 13(g)* will not be barred by res judicata, waiver, or estoppel from asserting it in a later action." *Dunn v. Sears, Roebuck & Co., 645 F.2d 511, 512 n.1 (5th Cir. 1981).*

Kodak fails, however, to cite an Eleventh Circuit case supporting its argument that claims between creditors involved in a bankruptcy proceeding are in fact permissive [*15] cross claims. In fact, the Eleventh Circuit has held,

> A party, for the purposes of former adjudication, includes "all who are directly interested in the subject matter and who have a right to make a defense, control the proceedings, examine and cross-examine witnesses and appeal from the judgment if an appeal lies." Thus, one who participates in a chapter 11 plan confirmation proceeding becomes a party to that proceeding even if never formally named as such.

Justice Oaks, 898 F.2d at 1550-51 (quoting A. Freeman, A Treatise of the Law of Judgments § 430, at 936-37 (5th ed. 1925)) (citations omitted). Kodak acknowledges that it was a party in interest in the Bankruptcy Proceeding. Furthermore, Kodak actually objected to the Asset Purchase Motion and to the 9019 Motion, both of which were supported by Wachovia. Thus, Kodak was a party to the Bankruptcy Proceeding.

This analysis is further bolstered by the Restatement of Judgments. In discussing suits in equity, the Restatement notes, "In many proceedings the defendants are necessarily adverse parties. This is true in interpleader proceedings in which the interests of the defendants in the fund are [*16] necessarily adverse." Restatement (First) of Judgments § 82 (1942). The court finds that a bankruptcy proceeding is more akin to an interpleader proceeding than a typical civil suit at law, given that the defendants in a bankruptcy proceeding are

asserting competing claims to a limited fund that, more often than not, will not satisfy those competing claims.

The Restatement also points out, "Although the rules of res judicata do not apply as between two persons who are not adversaries under the pleadings, the rendition of a judgment may create or destroy rights or liabilities so that the judgment may be determinative in subsequent litigation between them." *Id.* Throughout the Bankruptcy Proceeding, the bankruptcy judge was required to make judgments that established the rights of Wolf's creditors, including Wachovia and Kodak, to the limited funds that were available. In particular, the bankruptcy judge specifically held that the Subordination Agreement was valid and enforceable, thereby determining Kodak and Wachovia's respective rights.

Kodak and Wachovia actively participated throughout the course of the Bankruptcy Proceeding, and they were in an adversarial position given [*17] that each was attempting to obtain a share of a limited fund of money that could not satisfy all of Wolf's indebtedness to both Kodak and Wachovia. Thus, the parties to the New York Action, viz., Kodak and Wachovia, were also parties in the Bankruptcy Proceeding, and Kodak had a full and fair opportunity to raise its claims in the form of an objection in any of the proceedings leading up to and including the confirmation hearing. *See Justice Oaks, 898 F.2d at 1550.* For these reasons, the court holds that the third prerequisite is satisfied.

4. Whether the New York Action Is the "Same Cause of Action" as the Bankruptcy Proceeding for Purposes of Res Judicata

Though they cite cases from other circuits, both sides agree that the controlling case in the Eleventh Circuit in this instance is *In re Piper Aircraft Corporation.* Of course, Wachovia argues that the holding in Piper requires that this court affirm the bankruptcy court, while Kodak argues that it

requires that this court overrule the bankruptcy court. Since both sides agree that Piper is controlling but each side has a different interpretation of the case, the court deems it necessary to [* 18] provide a somewhat detailed examination of the facts, analysis, and holding in Piper.

In Piper, the Eleventh Circuit Court of Appeals held that res judicata did not bar a contract suit against the successful proponent of a debtor's reorganization plan because the suit did not involve the same cause of action as the bankruptcy. The suit had been brought by Kaiser Aerospace against Teledyne Industries for breach of a cooperation agreement by which Kaiser and Teledyne would cosponsor a plan of reorganization for the debtor, Piper Aircraft Corp. Under that plan, Kaiser would have invested funds in reorganized Piper and acquired 65% of its shares. The proposed plan was not confirmed, however, and Teledyne later proposed a new plan with a different investor, which ultimately was confirmed. Under the new plan, Teledyne acquired 24% of the shares in reorganized Piper (and waived its substantial claims against Piper in exchange). Kaiser sued Teledyne in state court for breach of the cooperation agreement, seeking damages and a constructive trust over Teledyne's shares in reorganized Piper, which Kaiser asserted it would have received under the prior, rejected plan. *Piper, 244 F. 3d at 1291-94.* [* 19]

In response, Teledyne, like Wachovia here, sought an injunction from the bankruptcy court barring Kaiser's suit on res judicata grounds so as to enforce the confirmation order. The bankruptcy court accepted Teledyne's contention that res judicata barred the constructive trust claim, viewing Kaiser's suit as a collateral attack on the confirmed plan. Although Kaiser did not ask the state court to alter the plan provision granting Teledyne a 24% interest in reorganized Piper, the practical result of the constructive trust claim would have been just that—to give Kaiser the 24% interest in reorganized Piper—and, thus, the bankruptcy court viewed the suit as

attacking "a material provision in the [confirmed] plan, namely, ownership and control of New Piper." *Id. at 1294.* The district court affirmed the bankruptcy court's order.

The Court of Appeals reversed, however, holding that Kaiser's suit against Teledyne was not based on the same cause of action as Piper's bankruptcy. After noting the standard of review, the Eleventh Circuit began its analysis by discussing the general principles of res judicata: "Under res judicata, also known as claim preclusion, a final [*20] judgment on the merits bars the parties to a prior action from re-litigating a cause of action that was or could have been raised in that action." *Id. at 1296* (citations omitted). The Court of Appeals then stated the four prerequisites that must be met in the Eleventh Circuit in order to invoke the doctrine:

> (1) the prior decision must have been rendered by a court of competent jurisdiction; (2) there must have been a final judgment on the merits; (3) both cases must involve the same parties or their privies; and (4) both cases must involve the same causes of action.

Id. (citations omitted). The Court of Appeals noted that, if these elements are met, then it must next determine "whether the claim in the new suit was or could have been raised in the prior action; if the answer is yes, res judicata applies." Id. (citations omitted). The Court of Appeals then turned its analysis to whether the four prerequisites to res judicata had been satisfied.

The parties in Piper agreed that the confirmation order at issue was issued by a court of competent jurisdiction and that it constituted a final judgment on the merits. But, as in the current case, [*21] the parties disagreed concerning the other two elements, viz., whether Kaiser was a party to the previous Chapter 11 action and whether the Chapter 11 proceeding involved the same cause of action that Kaiser was attempting to litigate in state court. Because the Eleventh Circuit

ultimately concluded that the Chapter 11 proceeding did not involve the same cause of action, it noted that it would not address whether Kaiser was a party to the proceeding. Next, the Court of Appeals discussed the necessary and sufficient conditions for a claim to be part of the same cause of action for res judicata purposes.

According to the Court of Appeals, Kaiser and Teledyne agreed "that claims are part of the same cause of action for res judicata purposes when they arise out of the same transaction or series of transactions." *Id. at 1296-97.* The Court of Appeals then held,

> "In determining whether the causes of action are the same, a court must compare the substance of the actions, not their form. It is now said, in general, that if a case arises out of the same nucleus of operative fact, or is based upon the same factual predicate, as a former action, that [sic] the two cases [*22] are really the same 'claim' or 'cause of action' for purposes of res judicata."

Id. at 1297 (quoting *Ragsdale v. Rubbermaid, Inc., 193 F. 3d 1235, 1239 (11th Cir. 1999)).*

The Eleventh Circuit observed that Kaiser contended that its state court action and the bankruptcy proceeding did not arise out of a common nucleus of operative facts. Kaiser argued that, though the bankruptcy proceedings gave rise to its state court claims, this fact alone did not establish that the two actions shared the same factual predicate. In addition, argued Kaiser, the facts giving rise to the state court action were not at issue in the confirmation, and the parties did not actually litigate, nor did the bankruptcy judge actually consider, those facts. In response, Teledyne argued that "but for" the filing of the bankruptcy case, the facts giving rise to the state court action would never have occurred. Teledyne further argued that the facts surrounding the formation of

Reorganized Piper were necessarily a topic considered by the bankruptcy court when it confirmed the second plan.

The Court of Appeals rejected Teledyne's "but for" analysis. After discussing two prior [*23] Eleventh Circuit cases, the Piper court held, "In this Circuit . . . res judicata does not bar a claim that was not in existence at the time of the original action unless the facts underlying the claim were actually raised in that action." *Id. at 1299.* Kaiser's claim against Teledyne arose during the course of the bankruptcy proceeding; therefore, res judicata did not bar Kaiser's state claim unless the facts underlying that claim were actually raised during the bankruptcy proceeding. Accordingly, the Eleventh Circuit turned its analysis to whether those facts were actually raised during the confirmation process. *Id.* The Court of Appeals ultimately held that those facts were not actually addressed by the bankruptcy court, nor were they sufficiently implicated by the confirmation process so as to warrant a finding that they arose out of the common nucleus of operative facts in the bankruptcy proceeding. Accordingly, the Eleventh Circuit held that Kaiser's state court action was not precluded by res judicata. *Id. at 1305.*

In their brief, Wachovia and Wolf argue that Piper is distinguishable from the case at hand because the facts giving [*24] rise to Kodak's state court claims were in existence prior to the initiation of the Bankruptcy Proceeding and because those facts were part of the same nucleus of operative facts that gave rise to the Bankruptcy Proceeding. Wachovia and Wolf further argue that the specific facts at issue in the New York Action were repeatedly implicated during the Bankruptcy Proceeding, particularly at the hearings on the Ritz Motion and on the 9019 Motion, even though Kodak chose not to address those facts. The court agrees with Wachovia and Wolf.

All of the claims that Kodak raises in the New York Action are based upon Wachovia's alleged breach of the Intercreditor Agreement, Wachovia's alleged fraud arising out of duties created by that agreement, and Wachovia's alleged interference with Kodak's contractual relationship with Wolf. All of these alleged actions, or failures to act, on the part of Wachovia took place before the initiation of the Bankruptcy Proceeding and were part of the common nucleus of operative facts relating to the complex creditor/intercreditor/debtor relationship that gave rise to the Bankruptcy Proceeding.

Kodak, however, focuses on the latter part of the opinion in Piper [*25] and argues that res judicata should not be applied in this case because the facts at issue in the New York Action were never actually litigated in the Bankruptcy Proceeding and because the bankruptcy court was not necessarily required to consider those facts during the Bankruptcy Proceeding, particularly during the confirmation of the Plan. This argument, however, is based on an erroneous reading of Piper. The only reason the Eleventh Circuit considered whether the facts of the later action were actually raised and litigated in the previous bankruptcy proceeding was because it first found that the facts giving rise to the subsequent action were not in existence prior to the initiation of the bankruptcy proceeding. Since "res judicata does not bar a claim that was not in existence at the time of the original action unless the facts underlying the claim were actually raised in that action" in the Eleventh Circuit, the Court of Appeals had to decide whether the claims were actually litigated in the previous action. *Piper*, 244 F. 3d at 1299.

The fact that the bankruptcy court did not actually consider, nor was it required to consider, all of the facts and issues that [*26] form the basis of the New York Action is irrelevant. Since those facts were existent before the filing of

the bankruptcy petition and were part of the foundation of the triangular creditor/intercreditor/debtor relationship between Wachovia, Kodak, and Wolf, those facts formed part of the common nucleus of operative facts that gave rise to both the Bankruptcy Proceeding and the New York Action. Accordingly, the court holds that the Bankruptcy Proceeding and the New York Action are the same cause of action for purposes of res judicata.

5. Whether Kodak Raised or Could Have Raised the Claims in the New York Action in the Prior Bankruptcy Action

Kodak argues that it did not actually raise its claims in the previous Bankruptcy Proceeding. Furthermore, Kodak argues that it could not have raised those claims because the bankruptcy court lacked jurisdiction to hear Kodak's state law claims and that it had no adequate procedural means to raise those claims. First, the court recognizes, and Wachovia does not contest, the fact that Kodak did not actually raise any of its claims during the Bankruptcy Proceeding. Thus, the issue is whether Kodak could have raised those claims during [*27] the Bankruptcy Proceeding.

If a party could have raised its claims by means of an objection to a confirmation of a plan of reorganization, then that party could have raised its claims for purposes of res judicata. See *Justice Oaks, 898 F.2d at 1552* (holding "[b]ecause the claims raised in the [plaintiffs'] adversary complaint were already raised, or could have been raised, in their objection to confirmation, we hold that the doctrine of claim preclusion bars them from re-litigating those claims.").

In the New York Action, Kodak essentially argues that Wachovia engaged in fraudulent and misleading conduct that constituted a breach of the Intercreditor Agreement, fraud, and tortious interference with Kodak's contractual relationship with Wolf. Kodak argues that the bankruptcy court would have lacked jurisdiction to hear those state law claims;

therefore, those claims cannot be barred. But Kodak could have raised those claims as an objection to the bankruptcy court's confirmation of the Plan. Furthermore, Kodak actually did bring those claims, in addition to a claim for equitable subordination, in the form of an adversary proceeding in the Bankruptcy Court for the [*28] Western District of New York. Kodak could have just as easily pursued the New York Adersary Proceeding in the Georgia bankruptcy court or raised its claims as objections during the various hearings conducted during the Bankruptcy Proceeding. Accordingly, for purposes of the applicability of res judicata, Kodak could have raised its claims in the Bankruptcy Proceeding, and res judicata precludes Kodak "from re-litigating a cause of action that was or could have been raised in that action." *Piper, 244 F.3d at 1296* (citations omitted). Since the claims Kodak brought in the New York Action could have been raised during the Bankruptcy Proceeding, res judicata bars Kodak from now litigating those claims in the New York Action.

III. Whether Equitable Estoppel Applies in This Instance

Because the court concludes that res judicata applies to bar Kodak's pursuit of the New York Action, the court does not separately decide whether equitable estoppel applies in this case.

IV. Whether the Bankruptcy Court Abused Its Discretion By Enjoining Kodak From Litigating the New York Action

Kodak argues that the bankruptcy court abused its discretion by enjoining [*29] Kodak from litigating the New York Action because Wachovia had an adequate remedy at law, i.e., Wachovia could have plead res judicata as an affirmative defense in the New York Action. Wachovia, however, argues that the bankruptcy court was acting within its discretion to enforce its previous orders by issuing the Preclusion Order.

"A bankruptcy court retains post-confirmation jurisdiction to interpret and enforce its own orders, particularly when disputes arise over a bankruptcy plan of reorganization." *In re Petrie Retail, Inc., 304 F.3d 223, 230 (2nd Cir. 2002).* In this case, the New York Action is essentially a collateral attack on the bankruptcy court's previous orders. That the New York Action is such a collateral attack can best be seen by considering the fact that the complaint filed in the New York Action is essentially identical to the complaint filed in the New York Adversary Proceeding, only without the claim for equitable subordination. The claim for equitable subordination clearly sought to undo the bankruptcy court's previous orders establishing the validity, extent, and priority of the claims of Kodak, Wachovia, and the other Prepetition Lenders. [*30] The claims for breach of contract, fraud, and tortious interference with contractual relations, which are based on the same set of facts as the
claim for equitable subordination, essentially seek to do the same. Thus, the bankruptcy court, in issuing the Preclusion Order, was simply exercising its post-confirmation jurisdiction and power to enforce its previous orders by precluding Kodak from collaterally attacking those orders. For this reason, the court finds that the bankruptcy court did not abuse its discretion by enjoining Kodak from pursuing the New York Action.

Conclusion

For the foregoing reasons, the court AFFIRMS the judgment of the bankruptcy court.

SO ORDERED, this 25th day of March, 2005.

CHARLES A. PANNELL, JR.

United States District Judge

APPENDIX C

UNITED STATES BANKRUPTCY COURT
N.D. GEORGIA
ATLANTA DIVISION

Bankruptcy Nos. 01-83470, 01-83472, 01-83474, 01-83475.Adversary No. 02-6454.

ATLANTA RETAIL, INC., f/k/a WOLF CAMERA, INC., *et al.* DEBTORS. ATLANTA RETAIL, INC., f/k/a WOLF CAMERA, INC. ATLANTA RETAIL SUBSIDIARY, LLC f/k/a WOLF XPRESS .COM, LLC, ATLANTA RETAIL, L/P/ f/k/a TEXAS PHOTO FINISH, L.P., and ATLANTA RETAIL PARTNER, INC., f/k/a FOX PHOTO PARTNER, INC. AND WACHOVIA BANK, NATIONAL ASSOCIATION,

Plaintiffs,

v.

EASTMAN KODAK COMPANY,

Defendant.

Aug. 22, 2003

ORDER

COLEMAN RAY MULLINS, *Bankruptcy Judge.*

THIS MATTER is before the Court on the Motion for Summary Judgment on the Complaint for Permanent Injunction Against Eastman Kodak Company (the "Motion"). The Motion was filed by Atlanta Retail, Inc., f/k/a Wolf Camera, Inc., et al. ("Wolf Camera" or the "Debtors") and Wachovia Bank, f/k/a First Union National Bank ("Wachovia" and together with the Debtors, the" Plaintiffs" and individually, each a "Plaintiff"). The Plaintiffs seek a

determination that the claims asserted by Eastman Kodak ("Kodak" or the "Defendant") in the United States District Court for the Western District of New York (the "New York Action") are equitably barred because of prior proceedings in the main bankruptcy case.

After reviewing the entire record and relevant case law, the Court concludes that the Plaintiffs are entitled to summary judgment.

FINDINGS OF FACT[1]

Wachovia and Kodak held substantial pre-petition, secured claims against Wolf Camera. The Second Amended and Restated Loan and Purchase Agreement, executed by Kodak and Wolf Camera in March of 2000 is of particular significance in this matter. Pursuant to the aforementioned agreement, Kodak agreed to make a $30,000,000 loan to Wolf Camera, subordinated to Wachovia's loans. This loan was in addition to the approximate $9,000,000 in subordinate loans Kodak had previously extended to Wolf Camera. As a condition precedent to disbursement of the $30,000,000 loan, Kodak had to receive certain consents from Wachovia. Prior to receipt of such consents, Kodak disbursed the $30,000,000 to Wolf Camera. Subsequently, Wolf Camera transferred all or substantially all of the loan proceeds to the Pre-Petition Lenders to pay down its indebtedness.[2]

On June 21, 2001, Wolf Camera and its affiliates filed voluntary petitions for relief pursuant to Chapter 11 of Title

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[1] Although the parties did not stipulate to the facts of this case, based upon the Defendant's Response to the Plaintiffs' Statement of Undisputed Facts and Counter-Statement of Undisputed Facts, the relevant facts are not disputed. Furthermore, many of the facts are based upon prior proceedings held in this Court, of which, the Court may take judicial notice.

[2] The Pre-Petition Lenders are inclusive of several financial institutions, with Wachovia acting as the administrative agent.

11 of the United States Code (the "Bankruptcy Code"). As of the petition date, as evidenced by the proofs of claim, the Debtors were indebted to the Pre-Petition Lenders in the approximate principal amount of $77,600,000. Attached to the proofs of claim were documents evidencing the relative priority of the claims and liens of Kodak and Wachovia. Specifically, Wachovia attached the 1998 Subordination and Intercreditor Agreements,[3] which evidences the subordinate status of Kodak's claims and liens against the assets of the ***302** Debtors to the claims and liens of Wachovia.

Pursuant to an emergency motion dated June 21, 2001 (the "DIP Motion"), the Debtors sought Court authorization to, among other things: 1) obtain DIP (debtor-in-possession) financing up to the principal amount of $10,000,000 from Wachovia and other financial institutions (the "DIP Lenders");[4] 2) utilize cash collateral of the Pre-Petition Lenders; and 3) provide adequate protection to the Pre-Petition Lenders. The Official Committee of Unsecured Creditors (the "Committee") objected to the DIP Motion. Kodak did not file an objection to the DIP Motion.

The Court eventually entered an order approving the DIP financing (the "Final Order"). Pursuant to the Final Order, the Debtors borrowed over $8,000,000 from the DIP Lenders and used cash collateral and other collateral of the Pre-Petition Lenders. The Final Order granted the Pre-Petition Lenders a

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[3] The 1998 Subordination Agreement provided, among other things, that Kodak's claims and liens arising from Wolf Camera's indebtedness to Kodak are subordinate in all respects, including the right of payment, to prior payment in full of all obligations of Wolf Camera to Wachovia and the Pre-Petition Secured Lenders, up to the amount of $120,000,000. The 1998 Intercreditor Agreement provided, among other things, that Kodak and Wachovia would use their best efforts to give the other notice of its actions which may significantly affect the other with regard to the ability of Wolf Camera to meet its obligations.

[4] Some of the Pre-Petition Lenders did not participate in the DIP loan.

security interest in and lien upon substantially all of the Debtors' assets and a superpriority claim, junior only to the security interest and debt owing to the DIP Lenders.

Pursuant to a motion dated August 23, 2001 (the " Asset Purchase Motion"), the Debtors sought an order approving the Asset Purchase Agreement between the Debtors and Ritz Camera Centers, Inc. ("Ritz"), pursuant to which, Ritz would acquire substantially all of the Debtors' assets. On September 13, 2001, the Debtors, along with Wachovia, filed an Amended Joint Motion to Approve Stipulation with Respect to Distribution of Proceeds from Sale of Assets of Debtors (the " Stipulation Motion"). The Committee and Kodak opposed the Asset Purchase Motion. Only the Committee opposed the Stipulation Motion.

In its objection to the Asset Purchase Motion, Kodak acknowledged the validity and senior status of the claims of the Pre-Petition Lenders, but contended that the sale violated section 363(f) of the Bankruptcy Code. After several days of hearings, the Court overruled the objections and granted both the Asset Purchase Motion and the Stipulation Motion (together, the "Sale and Stipulation Orders"). The Court specifically found that the value of the property being sold was less than the aggregate value of Wachovia's lien, rendering Kodak's subordinate claim worthless.

Pursuant to the Stipulation Order, the proceeds of the Ritz Sale were distributed as follows: a) first, to satisfy all outstanding obligations under the DIP financing; b) second, $20,000,000 to reduce the Pre-Petition Indebtedness; c) third, up to the next $25,000,000, to establish the administrative expense fund; and d) the balance, to reduce the Pre-Petition Indebtedness. As additional adequate protection and in consideration for consenting to the use of its cash collateral to pay the administrative expenses, the Pre-Petition Lenders were granted a first priority claim against the proceeds of any avoidance action recoveries and any surplus remaining in the

administrative expense fund after payment of allowed expenses.

On January 28, 2002, the Committee commenced an adversary proceeding against Wachovia (the "Committee Adversary") generally seeking a determination of the validity, extent, and priority of the Pre-Petition Lenders' claims and liens. Kodak did not file a proceeding to challenge the interests of the Pre-Petition Lenders. Wachovia, the Debtors, and the Committee eventually settled the Committee Adversary. On June 18, 2002, a motion was filed pursuant to ***303** Rule 9019 of the Federal Rules of Bankruptcy Procedure (the "9019 Motion"), seeking approval of the settlement of the Committee Adversary. A hearing on the 9019 Motion was held on July 16, 2002, with appearances by the Debtors, the Committee, Wachovia, and Kodak.

Kodak generally supported the 9019 Motion, but filed an objection based on two limited points: 1) that the dismissal of the Committee Adversary did not affect the rights of third parties against Wachovia; and 2) that the 9019 hearing did not constitute Kodak's opportunity to be heard on the issue of enforceability of the 1998 Subordination Agreement. The Court found that Kodak had on several occasions been afforded a full and fair opportunity to be heard on the enforceability of the 1998 Subordination Agreement. As a result, the Court approved the 9019 Motion, expressly finding that the 1998 Subordination Agreement was enforceable.

After the Committee Adversary was settled, but prior to the 9019 hearing, Kodak commenced an adversary proceeding in the United States Bankruptcy Court for the Western District of New York (the "WDNY Adversary").[5] Kodak sought,

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[5] The WDNY Adversary was filed notwithstanding the absence of a pending bankruptcy case in that court relating to the Debtors. In fact, the WDNY Adversary utilized the caption of the Debtors' case pending in this Court.

among other things, the equitable subordination of the claims of the Pre-Petition Lenders to Kodak's claim against the Debtors pursuant to section 510 of the Bankruptcy Code. Kodak alleged that it was misled into extending the $30,000,000 loan. Wachovia filed a motion to dismiss the WDNY Adversary; however, before responding to Wachovia's motion, but following the Court's approval of the 9019 Motion, Kodak voluntarily dismissed the WDNY Adversary.

Shortly thereafter, Kodak filed the New York Action against Wachovia in the Supreme Court of the State of New York, alleging breach of contract, tortious interference with contract, and fraud. The complaint filed in the New York Action was substantially identical to the complaint filed in the WDNY Adversary, minus the claim for equitable subordination. Wachovia caused the New York Action to be removed to the United States District Court for the Western District of New York.

On August 30, 2002, the Debtors filed their Disclosure Statement and Plan of Liquidation. The Disclosure Statement provided that "the Committee Stipulation [was] a critical prerequisite to the Plan as the Pre-Petition Bank Group would not be willing to compromise their Claims except as set forth therein." An order confirming the Debtors' plan was entered on January 7, 2003.

On October 11, 2002, the Plaintiffs filed a Complaint for Injunctive Relief, alleging that the New York Action is barred by the doctrines of *res judicata* and equitable estoppel. On October 16, 2002, the Plaintiffs filed a Motion for Preliminary Injunction (the "Preliminary Injunction Motion"). Following a hearing on the Preliminary Injunction Motion, the Court entered a consent order granting the motion, as prepared by the parties. Subsequently, Kodak filed a motion to dismiss and a motion to abstain. The Court denied both

motions. On January 23, 2003, the Plaintiffs filed the instant motion.

STANDARD OF REVIEW

The Plaintiffs seek a permanent injunction based on the doctrine of *res judicata*.[6] ***304** The Court will grant summary judgment only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). Material facts are those which might affect the outcome of a proceeding under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Furthermore, a dispute of fact is genuine "if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party." *Id.* The moving party has the burden of establishing the right to summary judgment. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir.1991); *Clark v. Union Mut. Life Ins. Co.*, 692 F.2d 1370, 1372 (11th Cir.1982).

In determining whether a genuine issue of material fact exists, the Court must view the evidence in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *Rosen v. Biscayne Yacht & Country Club, Inc.*, 766 F.2d 482, 484 (11th Cir.1985). The moving party has the burden to establish the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *See also* Fed.R.Civ.P. 56(e). Once the movant has made a *prima facie* showing of its right to judgment as a matter of law, the nonmoving party must go beyond the pleadings and demonstrate that there is a material issue of fact which precludes summary judgment.

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[6] In the Motion, the Plaintiffs assert that equitable estoppel bars the New York Action. The Court will not reach the issue of equitable estoppel, as *res judicata* alone bars the New York Action.

Celotex, 477 U.S. at 324, 106 S.Ct. 2548; *Martin v. Commercial Union Ins. Co.*, 935 F.2d 235, 238 (11th Cir.1991).

ANALYSIS

The parties herein subscribe to two very different views of the issues before the Court. Wachovia urges the Court to focus on the enforcement of its prior orders. Specifically, Wachovia argues that this Court's prior orders preclude the prosecution of the New York Action or any other action involving the same nucleus of operative facts. Alternatively, Kodak concedes that this Court has jurisdiction to enforce its own orders; however, Kodak alleges that this Court lacks subject matter jurisdiction to adjudicate the state law causes of action pled in the New York Action. Essentially, Kodak argues that the New York Action is simply an intercreditor dispute, completely unrelated to the Debtors.

Kodak's framing of the issues is at odds with the actual facts of this case, the law, and policy considerations. First, Kodak's assertion that this is simply a matter between two creditors fails to acknowledge the triangular relationship between Kodak, Wachovia, and the Debtors; it fails to acknowledge that their alleged cause of action would not exist "but for" the Debtors; and, it fails to account for the uncanny similarity between the complaint filed in the WDNY Adversary and the complaint filed in the New York Action. Second, Kodak mistakenly focuses on whether this Court has jurisdiction to adjudicate the claims in the New York Action, when the actual issue is whether the New York Action is a collateral attack on orders previously entered by this Court. Finally, policy considerations weigh heavily against permitting Kodak's attempt to take multiple bites at the apple, selectively choosing a forum and attempting to frustrate the policy promoting finality of proceedings.

***305** The Court does not agree with Kodak's assertion that the New York Action is simply a matter between two

creditors. Wachovia and Kodak were both substantial secured creditors of the Debtors. Wachovia's relationship with Kodak was based upon an agreement between the parties that Kodak's claims and liens arising from Wolf Camera's indebtedness to Kodak are subordinate in all respects to the obligations of Wolf Camera to Wachovia. In the New York Action, Kodak essentially asserts that the subordination agreement, although valid, should be found unenforceable.

That determination was made by this Court in the process of determining the validity, extent and priority of the claims against the Debtors.

[1] Most telling is the uncanny similarity between the complaint in the WDNY Adversary and the complaint filed in the New York Action. A redlined comparison of the documents *(see* Exhibit A, Plaintiffs' Reply Brief in Support of Motion for a Preliminary Injunction) indicates that the complaints are practically identical, with the only material change being the deletion of the claim for equitable subordination. This change certainly raises the concern that Kodak may have removed the section 510 equitable subordination claim to facially escape the inevitable conclusion that the claims should have been raised during the course of the bankruptcy proceeding. Both complaints seek recovery of the $30,000,000 that Kodak loaned the Debtors pursuant to the Second Amended and Restated Loan and Purchase Agreement. "It is well settled that res judicata turns primarily on the commonality of the facts of the prior and subsequent actions, not the nature of the remedies sought." *In re Piper Aircraft Corp.*, 244 F.3d 1289 (11th Cir.2001). By simply deleting the claim for equitable subordination, Kodak does not remove the New York Action from the reach of *res judicata,* as the commonality of facts still remains.

[2][3][4][5][6][7] The elements of *res judicata* have been satisfied and prevent Kodak's prosecution of the New York Action or any other action with the same nucleus of operative

facts. For *res judicata* to apply,[7] the following conditions must be met:

First, the prior judgment must be valid in that it was rendered by a court of competent jurisdiction and in accordance with the requirements of due process. Second, the judgment must be final on the merits. Third, there must be identity of both parties or their privies. Fourth, the later proceeding must involve the same cause of action as involved in the earlier proceeding. *Wallis v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd.),* 898 F.2d 1544, 1550 (11th Cir.1990) (citations omitted).

The first prong examines whether the purported preclusive judgment was rendered by a Court of competent jurisdiction in accordance with the requirements of due process. Kodak unpersuasively argues that the first requirement of *res judicata* has not been met because this Court does not have, and never had, jurisdiction to adjudicate the New York Action. This argument erroneously focuses on this Court's jurisdiction over the precluded action, not the effect of prior orders of this Court. No challenge to this Court's jurisdiction over the Final Order, the Sale and Stipulation Orders, the order approving the 9019 Motion, and the Confirmation Order, has been, nor could have been creditably raised. Each order was valid and ***306** rendered by a court of competent jurisdiction; therefore, the first prong of the test is satisfied.

The second prong examines whether the subject judgment is final and on the merits. Kodak does not dispute that the aforementioned prior orders have all become final and non-appealable. *See also In re Clinton Street Food Corp.,* 254 B.R. 523, 530 (Bankr.S.D.N.Y.2000) (stating that a

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[7] Because the parties have used the term *res judicata,* for consistency, the Court will also use this term. Notwithstanding, the Court acknowledges that the more precise term for the relief which the Plaintiffs seek is claim preclusion.

bankruptcy court's order "approving a sale of assets is a final order for res judicata purposes."); *In re Gloria Manufacturing Corp.,* 65 B.R. 341, 344-45 (E.D.Va.1985) (finding that financing orders " preclude the parties and their privies from relitigating issues that were or could have been raised..."); *In re Justice Oaks II, Ltd.,* 898 F.2d 1544, 1550 (11th Cir.1990) (citing *Stoll v. Gottlieb,* 305 U.S. 165, 170-171, 59 S.Ct. 134, 137, 83 L.Ed. 104 (1938)) (stating that an order confirming a plan of reorganization is given the same effect as any district court final judgment on the merits). However, Kodak argues that the merits of the New York Action do not implicate this Court's prior orders insofar as the prior orders address the validity, enforceability, character, or priority of Wachovia's claims or the validity of the 1998 Subordination Agreement. The Court is not persuaded by this argument and again, Kodak has misconstrued the requirements of *res judicata.* Each of the relevant prior orders were entered in core proceedings. If the prior orders "were non-core proceeding[s], [this Court] could only issue proposed findings of fact and conclusions of law, ... and such proposed findings would not be entitled to res judicata effect in subsequent litigation because there would have been no final judgment on the merits." *I.A. Durbin, Inc. v. Jefferson Nat'l Bank,* 793 F.2d 1541, 1548 n. 8 (11th Cir.1986). The Final Order, the Sale and Stipulation Orders, the order approving the 9019 Motion, and the Confirmation Order were all core proceedings, and as such were all on the merits and qualify for *res judicata* effect.

The third prong examines whether there is identity of the parties. Kodak and Wachovia are the only parties in the New York Action. For the purpose of former adjudication, a party includes "all who are directly interested in the subject matter and who have a right to make defense, control the proceedings, examine and cross-examine witnesses and appeal from the judgment if an appeal lies." *In re Justice Oaks II Ltd.,* 898 F.2d 1544, 1550-51 (11th Cir.1990) (citing 1 A. Freeman, *A Treatise of the Law of Judgments* § 430, at

936-37 (5th ed.1925)). "All creditors of a debtor are parties in interest." *Id.* at n. 5. Kodak and Wachovia were parties with respect to the subject prior orders, and as such, the identity of parties prong is satisfied.

The final prong examines whether the prior action involves the same cause of action as the action or actions sought to be precluded. When claims arise out of the same transaction or series of transactions, the claims are a part of the same cause of action. *Id.* at 1552 (citing Restatement (Second) Judgments § 24 (1982)). The validity of the 1998 Subordination and Intercreditor Agreements was an integral part of the prior orders entered by this Court, the WDNY Adversary, and the New York Action. Kodak's loan of $30,000,000 to the Debtors, which ultimately was used to pay down the Debtors' obligations to Wachovia, formed the factual basis for the WDNY Adversary, the New York Action, and any defense or claims that Kodak could have alleged in connection with this Court's determination of validity, extent and priority of claims. Because the claims that *could have* been raised in connection with this Court's prior orders are based on the same facts as the New York Action-to wit, the **307* $30,000,000 loaned by Kodak to the Debtors pursuant to the Second Amended and Restated Loan Agreement, the claims are part of the same cause of action and the final prong is satisfied.

[8] Policy considerations weigh heavily in favor of this Court enjoining the New York Action or any other action with the same nucleus of operative facts. Courts have generally recognized the importance of finality of judgments in bankruptcy. *Bank of Lafayette v. Baudoin, et al. (In re Baudoin)* , 981 F.2d 736, 739 (5th Cir.1993) (citing *Hendrick v. Avent,* 891 F.2d 583, 587 n. 9 (5th Cir.), *cert. denied,* 498

U.S. 819, 111 S.Ct. 64, 112 L.Ed.2d 39 (1990)). As stated by the court in *Baudoin:* [8]

[R]estraining litigious plaintiffs from taking more than 'one bite of the apple' has been our avowed purpose since the common law doctrine of res judicata first evolved. Of course, in the bankruptcy context, ... that bite is to be taken as expeditiously and economically as possible . . . Because of spiraling litigation costs, increasingly congested courts-especially bankruptcy courts-and expanding theories of recovery ... it is more imperative than ever that the doctrine of res judicata be applied with unceasing vigilance *Id.* (citations omitted).

Kodak stood silent while the Court determined the validity, extent, and priority of Wachovia's claims against the Debtors. Kodak did not object to, nor challenge, the following actions of Wachovia: 1) providing up to $10,000,000 in DIP financing; 2) providing from its cash collateral $25,000,000 to fund administrative expenses; 3) defending and settling the Committee Adversary; and 4) supporting the Debtors' plan. Wachovia will not come close to being paid its full claim against the Debtors. Undoubtedly, Wachovia had the right to expect that all matters related to its claim against the Debtor would be finally decided in this case and not subject to a collateral attack.

Many of the current Chapter 11 cases have substantially undersecured lenders. Such lenders are often the only entity willing to provide debtor in possession financing, pay for the administration costs of bankruptcy, and "leave money on the table" for unsecured creditors who would not otherwise receive a distribution from the bankruptcy estate.

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[8] Although in *Baudoin* the court was dealing with a Chapter 7 debtor, the same principals apply with equal vigilance in a Chapter 11 liquidation.

Such creditors realize that even though they bear the costs of the Chapter 11, they will, in many instances, not be fully paid. The *quid pro quo* for such creditors is to bring an expeditious close to all matters concerning their credit relationship with the debtor. Bluntly stated, such creditors pay for closure. Unsecured creditors would have no incentive to engage in such actions if the bankruptcy proceedings do not provide finality as to matters that are inextricably bound to their relationship with the debtor.

Certainly, if Wachovia and Kodak were "just two creditors" and the New York Action was based on a non-debtor related action, then Wachovia could not expect finality. However, the New York Action is related to the Debtors, and is in essence about whether Wachovia's claim should be reduced by $30,000,000. As such, policy considerations dictate finality, and Kodak made a tactical decision to forego its "one bite at the apple."

CONCLUSION

For the foregoing reasons, the Court finds that the New York Action or any other action with the same nucleus of operative ***308** facts, is barred by the doctrine of *res judicata.* Accordingly,

IT IS ORDERED that the Motion be and is hereby **GRANTED**.

The Clerk of Court shall serve a copy of this Order upon the Plaintiffs' counsel, the Defendant's counsel, and the Trustee.

APPENDIX D

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Case Nos. 01-83470, 01-83472, 01-83474 and 01-83475
Chapter 11
Jointly Administered
Judge Mullins

In re: ATLANTA RETAIL, INC., f/k/a WOLF CAMERA, INC.,
a Georgia corporation, Tax ID No. 58-1210910, and affiliates,
Debtors.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER CONFIRMING THE DEBTORS' FIRST AMENDED PLAN OF LIQUIDATION

DATED August 30, 2002

Debtors Atlanta Retail, Inc., f/k/a Wolf Camera, Inc.; Atlanta Retail Subsidiary, LLC, f/k/a WolfXpress Com, LLC; Atlanta Retail Partner, Inc., f/k/a Fox Photo Partner, Inc.; and Atlanta Retail, L.P., f/k/a Texas Photo Finish, L.P. (collectively "Debtors"), having filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1330 (as amended and supplemented, the "Bankruptcy Code"), on June 21, 2001; and Debtors having proposed the Debtors' First Amended Plan of Liquidation dated August 30, 2002 (the "Plan")[1] and filed their Second

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[1] Unless otherwise specified, capitalized terms and phrases used herein have the meanings assigned to them in the Plan (as defined herein). Any

Amended Disclosure Statement Attendant to Debtors' First Amended Plan of Liquidation dated October 30, 2002 (the "Disclosure Statement") in support thereof; and the Bankruptcy Court after notice and a hearing (the "Disclosure Statement Hearing") having entered an order dated October 21, 2002 (a) approving the Disclosure Statement and Summary Disclosure Statement (as defined in such order), (b) scheduling a hearing on confirmation of the Plan for December 12, 2002 (the "Confirmation Hearing"), (c) approving the form and manner of notice related thereto; and (d) approving voting and certain other procedures (the "Scheduling Order"); and Debtors having filed the Affidavit of Carole G. Donlin certifying tabulation of votes with respect to the Plan (the "Voting Declaration") on December 10, 2002; and Debtors having complied with the notice requirements as set forth in the Scheduling Order; and the Bankruptcy Court having established December 12, 2002 at 10:00 a.m., Eastern Time, as the date and time of the Confirmation Hearing; and objections to confirmation of the Plan having been timely filed and/or served by December 2, 2002; and the Bankruptcy Court having reviewed the Plan, the Disclosure Statement, the Summary Disclosure Statement, the Scheduling Order, the Voting Declaration, any timely filed objections to the Plan, and other papers before the Bankruptcy Court; and the Bankruptcy Court having heard the statements of counsel in relation to confirmation at the Confirmation Hearing, as reflected in the record at the Confirmation Hearing; and the Bankruptcy Court having considered all testimony presented and evidence admitted at the Confirmation Hearing; and the Bankruptcy Court finding that: (i) notice of the Confirmation Hearing and

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term used in the Plan or this Order that is not defined in the Plan or this Order, but that is used in the Bankruptcy Code or the Bankruptcy Rules, shall have the meaning given to that term in the Bankruptcy Code or the Bankruptcy Rules, as applicable. If there is any direct and irreconcilable conflict between the terms of the Plan and the terms of this Order, the terms of this Confirmation Order shall control.

the opportunity of any party in interest to object to confirmation was adequate and appropriate, in accordance with applicable Bankruptcy Rules, including Bankruptcy Rule 2002, as to all parties to be affected by the Plan and the transactions contemplated thereby; (ii) Debtors have complied with the notice requirements set forth in the Scheduling Order; and (iii) the legal and factual bases set forth at the Confirmation Hearing, and as set forth in this Confirmation Order, establish just cause for the relief granted herein; the Bankruptcy Court hereby makes the following Findings of Fact, Conclusions of Law and Order.[2]

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW.

A. Jurisdiction and Venue.

On June 21, 2001 (the "Petition Date") Debtors commenced their respective cases by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code. The Bankruptcy Court has jurisdiction over these Chapter 11 Cases and the property and parties affected thereby pursuant to 28 U.S.C. §§ 157 and 1334. Confirmation of the Plan is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(L) over which the Bankruptcy Court has jurisdiction. Pursuant to 28 U.S.C. §§ 1408 and 1409, venue for the Chapter 11 Cases in the United States Bankruptcy Court for the Northern District of Georgia was proper as of the Petition Date and continues to be proper.

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[2] This Confirmation Order constitutes the Bankruptcy Court's findings of fact and conclusions of law under Fed. R. Civ. P. 52, as made applicable by Bankruptcy Rules 7052 and 9014. Any finding of fact shall constitute a finding of fact even if it is stated as a conclusion of law, and any conclusion of law shall constitute a conclusion of law even if it is stated as a finding of fact.

B. Compliance with the Requirements of Section 1129(a) of the Bankruptcy Code.

1. Section 1129(a)(1)—Compliance of the Plan with Applicable Provisions of the Bankruptcy Code.

The Plan complies with all applicable provisions of the Bankruptcy Code, as required by section 1129(a)(1) of the Bankruptcy Code, including sections 1122 and 1123 of the Bankruptcy Code.

Due and proper notice of the Disclosure Statement Hearing and the Confirmation Hearing was provided to all persons required to receive notice thereof. Any person who requested as copy of any of the documents referred to in the Disclosure Statement, the Summary Disclosure Statement or the Plan was provided with copies of such documents. All persons having an interest, vested or contingent, present or future, to the extent such person can presently be identified had due, proper and adequate notice of the Confirmation Hearing. The Debtors, as proponents of the Plan, have complied with all applicable provisions of the Bankruptcy Code and the Bankruptcy Rules governing notice, disclosure and solicitation of the Plan. The solicitation of votes from Holders of Claims was in good faith and in compliance with the applicable provisions of the Bankruptcy Code and the Bankruptcy Rules. The solicitation and tabulation of ballots was proper and adequate.

a. Sections 1122 and 1123(a)(1)-(4)—Classification and Treatment of Claims and Interests.

As required by sections 1122(a) and 1123(a)(1) of the Bankruptcy Code, Article II of the Plan designates Classes of Claims and Interests, and the classification scheme is reasonable and necessary to implement the provisions of the Plan. Claims against Debtors are classified separately in Classes 1 through 6. Interests in the Debtors are classified separately in Class 7. As required by section 1122(a) of the Bankruptcy

Code, each class of Claims and Interests contains only Claims or Interests that are substantially similar to the other Claims or Interests within that class. Such classification is proper under section 1122(a) because each Claim in each class of Claims is substantially similar to the other Claims in such class and each Interest is substantially similar to the other Interests in such class. The Plan places all Claims against any Debtor in Classes 1 through 6, regardless of whether such claims are against a single Debtor or multiple Debtors. Such classification is proper under the facts and circumstances of the Plan and these Chapter 11 Cases. In accordance with sections 1123(a)(2) and (3) of the Bankruptcy Code, Article III of the Plan specifies all classes of Claims and Interests that are impaired and unimpaired under the Plan, and specifies the treatment of all classes of Claims and Interests that are impaired and unimpaired under the Plan. In accordance with section 1123(a)(4) of the Bankruptcy Code, Article III of the Plan also provides the same treatment for each Claim or Interest within a particular class, unless the Holder of a Claim or Interest agrees to less favorable treatment of its Claim or Interest.

b. Section 1123(a)(5)—Adequate Means for Implementation of the Plan.

Articles IV through VIII and other provisions of the Plan set forth the means by which the Plan will be implemented, which are adequate for such purpose. Those provisions include, among other things: (i) the cancellation of equity interests in the Debtors; and (ii) the retention of cash and other assets to fund the distribution to administrative, priority, secured and, in certain instances, unsecured creditors as more particularly provided for in the Plan. The Plan thus provides adequate means for its implementation, thereby satisfying section 1123(a)(5) of the Bankruptcy Code.

c. Section 1123(a)(6)—Prohibition Against the Issuance of Nonvoting Equity Securities.

No nonvoting equity securities are issued pursuant to the Plan. Accordingly, the Plan satisfies the requirement of section 1123(a)(6) of the Bankruptcy Code.

d. Section 1123(a)(7)—Selection of Directors and Officers in a Manner Consistent with the Interests of Creditors and Equity Security Holders and Public Policy.

The Plan provides for the substantive consolidation of the Debtors and the liquidation of the Debtors' assets under the oversight of the Estate Representative. No other directors or officers of the Debtors will be appointed under the Plan. The Plan satisfies section 1123(a)(7).

2. Section 1129(a)(2)—Compliance with Applicable Provisions of the Bankruptcy Code.

Debtors have complied with all applicable provisions of the Bankruptcy Code, as required by section 1129(a)(2) of the Bankruptcy Code, including section 1125 of the Bankruptcy Code, Bankruptcy Rules 3017 and 3018, and the Scheduling Order. The Disclosure Statement, the Summary Disclosure Statement and the procedures by which the ballots for acceptance or rejection of the Plan were solicited and tabulated were fair, properly conducted and in accordance with section 1126 of the Bankruptcy Code and Bankruptcy Rule 3018.

3. Section 1129(a)(3)—Proposal of the Plan in Good Faith.

Debtors proposed the Plan in good faith and not by any means forbidden by law. In determining that the Plan has been proposed in good faith, the Bankruptcy Court has examined the totality of the circumstances surrounding the formulation of the Plan. Based on the uncontroverted evidence presented at the Confirmation Hearing, the Bankruptcy Court

finds and concludes that the Plan has been proposed with the legitimate and honest purpose of liquidating the Debtors' assets and maximizing the returns available to Holders of Allowed Claims against Debtors. Moreover, the Plan itself, and the arms' length negotiations among Debtors, the Bank Group and the Creditors' Committee leading to the Plan's formulation, as well as the overwhelming support of creditors for the Plan, provide independent evidence of Debtors' good faith in proposing the Plan.

4. Section 1129(a)(4)—Bankruptcy Court Approval of Certain Payments as Reasonable.

The amount and nature of Administrative Claims incurred by Debtors in the ordinary course of business are reasonable and no further disclosure is required. Article VII of the Plan provides that entities asserting a Professional Compensation Claim or other Administrative Claim for services rendered or goods provided before the Confirmation Date must file and serve an application for final allowance of such Claim which the Court will review for reasonableness. Therefore, all payments made or to be made by Debtors for services, costs or expenses incurred in, or in connection with, the Chapter 11 Cases, or in connection with the Plan and incident to the Chapter 11 Cases, have been disclosed and are reasonable (or are subject to approval by this Court). Accordingly, the Plan satisfies section 1129(a)(4).

5. Section 1129(a)(5)—Disclosures Regarding Proposed Directors and Officers, and Compensation of Insiders and Consistency with the Interests of Creditors and Public Policy.

Debtors, as proponents of the Plan, have disclosed the identity and affiliations of the Estate Representative who will serve after Plan Confirmation. No directors or officers will be appointed under the Plan. Therefore, the Plan satisfies the requirements of section 1129(a)(5) of the Bankruptcy Code.

6. Section 1129(a)(6)—Approval of Rate Changes.

The Plan does not change rates over which any regulatory commission has or will have jurisdiction after Confirmation. Section 1129(a)(6) is inapplicable to Confirmation.

7. Section 1129(a)(7)—Best Interests of Holders of Claims and Interests.

With respect to each impaired class of Claims and Interests, each Holder of a Claim in such impaired Class has accepted the Plan or, as demonstrated by the Disclosure Statement and other evidence presented at the Confirmation Hearing, will receive or retain under the Plan on account of such Claim property of a value as of the Effective Date that is not less than the amount such Holder would receive or retain if Debtors were liquidated on the Effective Date under chapter 7 of the Bankruptcy Code. Accordingly, the Plan satisfies section 1129(a)(7) of the Bankruptcy Code.

8. Section 1129(a)(8)—Acceptance of the Plan by Each Impaired Class.

As set forth in detail in the Voting Declaration, Class 5 and Class 6 are each impaired, and each have accepted the Plan by the requisite majorities in amount and number. Specifically, of the two Holders representing $40,113,119.00 of Class 5 Claims actually voting, votes representing the entire $40,113,119.00 of claims voted to accept the Plan, which represents an acceptance rate of one hundred percent. Of the 366 Holders of Class 6 Unsecured Claims actually voting, 335 voted to accept the Plan. These accepting votes represent unsecured claims totaling $153,526.39. This represents an acceptance rate among Class 6 Voters of 91.530 percent by number of claims holders, or 95.813 percent by dollar amount.

Because they will receive no property or other distribution under the Plan, the Holders of Class 7 Interests in the Debtors

are conclusively presumed to have rejected the Plan. As a result, the Plan does not comply with section 1129(a)(8). Debtors have invoked the "cramdown" requirements of section 1129(b) with respect to each of these classes. As discussed below, the Plan satisfies each of the cramdown requirements.

9. Section 1129(a)(9)—Treatment of Claims Entitled to Priority Pursuant to Section 507(a) of the Bankruptcy Code.

Article III of the Plan provides for treatment of Allowed Administrative Claims, Priority Tax Claims and other Priority Claims in the manner required by section 1129(a)(9) of the Bankruptcy Code, except to the extent that the Holder of a particular Administrative Claim, Employee Compensation Claim, Employee Benefit Claim, Customer Deposit Claim or Tax Claim agrees to different treatment.

10. Section 1129(a)(10)—Acceptance By at Least One Impaired Class.

As indicated in the Voting Declaration and as reflected in the record of the Confirmation Hearing, Classes 5 and 6 are impaired under the Plan and have accepted the Plan, determined without including any acceptance of the Plan by any insiders in such Classes. Therefore, the Plan satisfies section 1129(a)(9).

11. Section 1129(a)(11)—Feasibility of the Plan.

As established by the Disclosure Statement and at the Confirmation Hearing, Debtors have demonstrated that the Debtors have funds available to make all payments required to be made and to perform all obligations required to be performed under the Plan. Accordingly, the Plan satisfies the feasibility requirement of section 1129(a)(11) of the Bankruptcy Code.

12. Section 1129(a)(12)—Payment of Bankruptcy Fees.

Sections 2.1 and 3.1 of the Plan provide that all fees payable pursuant to 28 U.S.C. § 1930 will be paid on or before the Distribution Date. The Plan therefore satisfies section 1129(a)(12) of the Bankruptcy Code.

13. Section 1129(a)(13)—Retiree Benefits.

Any "retiree benefits" as defined in section 1114(a) of the Bankruptcy Code shall be paid on or before the Distribution Date as required by Bankruptcy Code section 503. Section 1129(a)(13) is thus satisfied.

C. Compliance with Section 1129(b) of the Bankruptcy Code.

Pursuant to section 1129(b)(1) of the Bankruptcy Code, the Plan is confirmed, notwithstanding that the Interests classified in Class 7 are Impaired, and that such Holders are deemed to have rejected the Plan pursuant to section 1126(g) of the Bankruptcy Code. The Plan does not discriminate unfairly and is fair and equitable with respect to the Holders of Claims and Interests in such Classes. No Holder of Claims or Interests junior to the Holders of Class 6 Unsecured Claims will receive or retain any property under the Plan on account of such junior Claims or Interests.

D. Section 1129(d)—Purpose of Plan.

The primary purpose of the Plan is not avoidance of taxes or avoidance of the requirements of Section 5 of the Securities Act, and there has been no objection filed by any governmental unit asserting such avoidance.

E. Satisfaction of Conditions to Confirmation.

Each of the conditions precedent to the entry of this Confirmation Order has been satisfied.

F. Compliance with Section 1125(e) of the Bankruptcy Code.

Pursuant to section 1125(e) of the Bankruptcy Code, Debtors' solicitation of acceptances of the Plan were made in good faith and in compliance with applicable provisions of the Bankruptcy Code. Accordingly, Debtors and their respective directors, officers, employees, agents and professionals retained with the approval of the Bankruptcy Court (acting in such capacity) are entitled to the protection of section 1125(e) of the Bankruptcy Code.

G. Exemptions From Taxation.

Pursuant to section 1146(c) of the Bankruptcy Code: (1) the creation of any mortgage, deed of trust, lien, or other security interest; (2) the making or assignment of any lease or sublease; or (3) the making or delivery of any deed or other instrument of transfer under, in furtherance of, or in connection with the Plan, including any restructuring, will not be subject to any stamp tax, real estate transfer tax or similar tax and the appropriate state or local governmental officials or agents shall be, and hereby are, directed to forego the collection of any such tax or governmental assessment and to accept for filing and recordation any of the foregoing instruments or other documents without the payment of any such tax or governmental assessment.

H. Corporate Issues.

Debtors have disclosed all material facts regarding: (1) the selection of the Estate Representative; (2) the distribution of Cash pursuant to the Plan; (2) the substantive consolidation of Debtors after the Effective Date; and (4) the other matters provided for under the Plan involving the corporate structure of any Debtor or corporate action to be taken by or required of any Debtor.

Substantive consolidation in furtherance of the confirmation of the Plan is necessary and in the best interests of the Debtors, the [illegible]ate and Creditors. During the Debtors' operations, the D[illegible]rs acted primarily as one entity conducting business under a single name, "Wolf Camera," and with substantially identical officers and a single cash management system. No Creditor will be prejudiced by the substantive consolidation of the Debtors.

I Liquidation Analysis.

The Liquidation Analysis set forth in the Disclosure Statement, was accurate at the time prepared, no material events have transpired which would materially alter the analysis and the analysis was based on reasonable and sound business assumptions.

J. Assumptions of Executory Contracts and Unexpired Leases.

Each pre-or post-Confirmation assumption of an executory contract or unexpired lease pursuant to Article IV of the Plan shall be legal, valid and binding upon the applicable Debtors and all non-Debtor parties to such executory contract or unexpired lease, all to the same extent as if such assumption had been effectuated pursuant to an appropriate authorizing order of the Bankruptcy Court entered before the Confirmation Date under section 365 of the Bankruptcy Code.

II. ORDER.

ACCORDINGLY, THE COURT HEREBY ORDERS, ADJUDGES AND DECREES THAT:

1. Confirmation of the Plan.

The Plan shall be and hereby is confirmed in each and every respect pursuant to section 1129 of the Bankruptcy Code. Any modifications to the Plan as approved by the Bankruptcy Court at the Confirmation Hearing shall be, and

hereby are, approved and incorporated into and made part of the Plan. A copy of the Plan, with amendments announced and approved at the Confirmation Hearing, is attached hereto as Exhibit A. Each and every provision of the Plan is incorporated into and made an integral part of this Confirmation Order as if the Plan were set forth entirely in this paragraph.

2 Objections Overruled.

To the extent that any objections to confirmation of the Plan have not been withdrawn or otherwise disposed of on or before the date hereof, all such objections shall be, and hereby are, overruled and all withdrawn objections shall be, and hereby, are deemed withdrawn with prejudice.

3. Effects of Confirmation.

a. Immediate Effectiveness; Successors and Assigns.

Pursuant to Bankruptcy Rule 9014, Bankruptcy Rule 7062 shall not apply to this Order. Notwithstanding any otherwise applicable law, immediately upon the entry of this Confirmation Order, pursuant to section 1141 of the Bankruptcy Code the terms of the Plan and this Confirmation Order shall be, and hereby are, deemed binding upon Debtors, any and all Holders of Claims or Interests (irrespective of whether such Claims or Interests are unimpaired under the Plan or whether the Holders of such Claims or Interests accepted, rejected or are deemed to have accepted or rejected the Plan), any and all non-debtor parties to executory contracts and unexpired leases with any Debtors and the respective heirs, executors, administrators, successors or assigns, if any, of any of the foregoing.

b. Cancellation of Equity Securities.

On the Effective Date, all equity securities of any Debtor shall be, and hereby are, canceled and of no further force and effect without the need for any further action on the part of any Debtor. The Holders of or parties to such canceled instru-

ments, securities and other documentation shall have no rights arising from or relating to such instruments, securities and other documentation or the cancellation thereof other than as set forth in the Plan.

c. The Creditors' Committee

On the Effective Date, the Official Committee of Unsecured Creditors will continue in existence as specifically provided for in and subject to the Plan, including Plan section 5.7.

4. Administrative Claims Bar Date.

All applications for payment of Administrative Claims and expenses incurred between November 2, 2001 and the Confirmation Date under sections 507(a)(i) or 507(b) of the Bankruptcy Code (except for claims incurred in the ordinary course of business, claims under 28 U.S.C. § 1930 and claims of Court-approved professionals) shall be filed and served on Debtors' no later than 20 days after the Date of this Order. Professionals or other entities asserting a Professional Fee Claim for services rendered before or through the Confirmation Date must file and serve on Debtors and their counsel an application for final allowance of such Professional Fee claim no later than 60 days after the Effective Date. Objections to these claims will be governed by Section 7.2 of the Plan.

5. Matters Relating to Implementation of the Plan.

a. Implementation.

Prior to the occurrence of the Effective Date, the Estate Representative, Debtors and their directors, officers and representatives shall be and hereby are authorized and empowered to take all actions necessary or appropriate to consummate the transactions contemplated by the Plan and to perform thereunder.

b. Substantive Consolidation.

Debtors shall be substantively consolidated for purposes of voting, confirmation and distribution. All assets and liabilities of Debtors shall be deemed merged or treated as though they were merged into and with the assets and liabilities of all Debtors. Any guarantee executed for any Debtor by any other Debtor and any joint or several liability of any of Debtors shall be deemed to be one obligation of the consolidated Debtors. Each and every Claim filed or to be filed in the Chapter 11 Case of any of Debtors shall be deemed filed against the consolidated Debtors, and shall be deemed one Claim against and obligation of the consolidated Debtors.

c. Injunctions and Stays Remain in Effect until Effective Date.

All injunctions and stays pursuant to sections 105 and 362 of the Bankruptcy Code or otherwise shall remain in full force and effect until the Effective Date of the Plan, except that nothing herein shall bar the taking of such actions as are necessary to effectuate the transactions specifically contemplated by the Plan or this Confirmation Order prior to the Effective Date. Subsequent to the Effective Date, all such injunctions and stays shall cease and be of no further force or effect, without further order of the Bankruptcy Court being necessary.

d. Revesting of Assets.

On the Effective Date, the property of each of the Estates, together with any property of a Debtor that is not property of its Estate and that is not specifically disposed of pursuant to the Plan, shall remain property or assets of the Estate without the need for any further Bankruptcy Court order or act by Debtors. Thereafter, the Estate Representative may use, acquire, and dispose of property free of any restrictions of the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the Bankruptcy Court. As of the Effective Date, all

property of Debtors shall remain subject to any preexisting claims and interests, except as specifically provided in the Plan or the Confirmation Order.

e. Corporate Action.

All matters provided for in the Plan involving the corporate structure of Debtors, or any corporate action required by Debtors in connection with the Plan shall be, and hereby are, deemed to have occurred and be effective as provided in the Plan, and shall be, and hereby are, authorized and approved in all respects without any requirement of further action by any Person or entity.

f. Management of the Estate.

On and after the Effective Date, Estate Representative shall have the responsibility for the management, control and operation of the Estate, as more particularly described in and subject to the terms of the Plan, including section 5.5 of the Plan.

g. Distributions.

The Estate Representative shall make all distributions required under the Plan in accordance with the terms and provisions of the Plan. Notwithstanding any other provision of the Plan or this Confirmation Order, each Person or entity that has received any distribution pursuant to the Plan shall, and hereby does, have sole and exclusive responsibility for the satisfaction and payment of any tax obligation imposed by any governmental unit, including income, withholding and tax obligations, on account of such distribution.

The Estate Representative shall receive from the Estate reasonable compensation for such services and reimbursement of reasonable out-of-pocket expense incurred in connection with such services pursuant to the Plan, including Plan section 5.11.

6. Actions in Furtherance of the Plan.

The approvals and authorizations specifically set forth in this Confirmation Order are nonexclusive and are not intended to limit the authority of the Estate Representative to take any and all actions necessary or appropriate to implement, effectuate and consummate any and all documents or transactions contemplated by the Plan or this Confirmation Order. In addition to the authority to execute and deliver, adopt or amend, as the case may be, the contracts, leases, instruments, releases and other agreements specifically granted in this Confirmation Order, The Estate Representative shall be, and hereby is, authorized and empowered to take any and all such actions as, are necessary or appropriate to implement, effectuate and consummate any and all documents or transactions contemplated by the Plan or this Confirmation Order.

7. Special Provisions Regarding Entry of a Final Decree Closing the Chapter 11 Cases.

It is contemplated that as soon as practicable after the completion of all distributions under the Plan, this Court shall enter a final decree closing the Chapter 11 Cases.

8. Retention of Jurisdiction.

Notwithstanding the entry of this Confirmation Order or the occurrence of the Effective Date, the Bankruptcy Court shall retain such jurisdiction over the Chapter 11 Cases as is legally permissible, including jurisdiction over the matters set forth in the Plan.

9. Notice Of Entry Of Confirmation Order.

Pursuant to Bankruptcy Rules 2002(f)(7) and 3020(c), Debtors shall be, and hereby are, directed to serve a notice of the entry of this Confirmation Order and the establishment of bar dates, substantially in the form of Exhibit B attached hereto and incorporated herein by reference (the "Confirma-

tion Notice"), on all parties in interest, no later than 7 days after the Confirmation Date; provided, however, that Debtors shall be obligated to serve the Confirmation Notice only on the record holders of Claims or Interests as of the Record Date.

10. Waiver of Bankruptcy Rule 3020(e).

The ten-day stay imposed by Bankruptcy Rule 3020(e) is waived, and the Plan shall take effect immediately on entry of this Confirmation Order.

/s/ C. Ray Mullins
THE HONORABLE C. RAY MULLINS,
UNITED STATES BANKRUPTCY JUDGE

Submitted by:

/s/ Jeffrey W. Kelley
Jeffrey W. Kelley
Shannon Lowry Nagle
Jonathan W. Jordan
David A. Geiger
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Counsel for Debtors and Debtors-in-Possession

EXHIBIT A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Case Nos. 01-83470, 01-83472, 01-83474 and 083475
Chapter 11
Jointly Administered
Judge C. Ray Mullins

ATLANTA RETAIL, INC. f/k/a Wolf Camera, Inc., ATLANTA RETAIL SUBSIDIARY, LLC f/k/a WolfXpress.Com, LLC, ATLANTA RETAIL, L.P. f/k/a Texas Photo Finish, L.P., AND ATLANTA RETAIL PARTNER, INC. f/k/a Fox Photo Partner, Inc.,
Debtors.

DEBTORS' FIRST AMENDED PLAN OF LIQUIDATION

Dated: August 30, 2002

Debtors Atlanta Retail, Inc. f/k/a Wolf Camera, Inc., Atlanta Retail Subsidiary, LLC f/k/a WolfXpress.Com, LLC, Atlanta Retail Partner, Inc. f/k/a Fox Photo Partner, Inc., and Atlanta Retail, L.P. f/k/a Texas Photo Finish, L.P., propose the following First Amended Plan of Liquidation pursuant to 11 U.S.C. § 1121. Reference is made to the First Amended Disclosure Statement with respect to this Plan of Liquidation for a discussion of, among other things, Debtors' history, results of liquidation and projections for future results of liquidation, and for a summary and analysis of the Plan of Liquidation and certain related matters.

* * * *

the Estate Representative and deposited in the Distribution Fund. The Secured Creditor must file a proof of claim for any deficiency, or amend a preexisting claim within 60 days of the surrender of the collateral. In the event that an Allowed Secured Claim *arises as a* result of a right of setoff in favor of the holder of the Secured Claim, the holder of such Secured Claim shall be entitled to exercise its right of setoff, without further order of the Court, notwithstanding the provisions of Bankruptcy Code section 362, provided, however, that such setoff rights are subject to the other provisions of the Bankruptcy Code, including, without limitation, section 553. This Class is unimpaired.

Section 3.5. Class 5 - Secured Claims of the Pre-Petition Bank Group and the Swap Lender. The Pre-Petition Agent (on behalf of the Pre-Petition Bank Group and the Swap Lender) holds a first priority security interest in virtually all property of the Debtors. Pursuant to the Sale, substantially all of Debtors' property was *sold* during the Debtors' bankruptcy cases with the Pre-Petition Agent's liens attaching to the proceeds of the Sale. The proceeds of the Sale were less than the amount of the Pre-Petition Bank Group's and the Swap Lender's Claims. The Pre-Petition Agent (on behalf of the Pre-Petition Bank Group), the Post-Petition Agent *(on* behalf of the Post-Petition Lenders), the Swap Lender and the Debtors entered into that certain Revised Stipulation and Order Authorizing Distribution of Proceeds from Sale of Assets of the Debtors dated September 12, 2001 (the "Stipulation"), which was approved by the Court by Order dated September 26, 2001. Pursuant to paragraphs 2, 3 and 5 of the Stipulation, the Pre-Petition Bank Group and the Swap Lender agreed to allow the Debtors to use proceeds of the Sale and other proceeds of the Debtors' operations (the "Administrative Expense Fund") to *fund* the payment of Administrative Claims and priority Claims, including post-Sale trailing expenses and other expenses which will be incurred in winding up the affairs of the Estate in an orderly fashion. In consideration of

the Pre-Petition Bank Group's agreement to permit use of the Administrative Expense Fund to pay Administrative Claims and priority Claims, the Debtors stipulated, with the approval of the Court, that they would pay to the Pre-Petition Agent, for the benefit of the Pre-Petition Bank Group and the Swap Lender, the proceeds of Avoidance Actions (which Debtors would have otherwise used to pay Administrative and priority Claims) up to the amount of the Administrative Expense Fund actually used to pay Administrative and priority Claims, but only to the extent of the Pre-Petition Agent's Allowed Secured Claim.

The Creditors Committee filed an adversary proceeding against the Pre-Petition Agent challenging, among other things, (i) the validity and extent of some of the Pre-Petition Bank Group's liens and (ii) the allocation of the proceeds of the Sale, proceeds of unencumbered Estate assets and Avoidance Actions (the "Creditors Committee Adversary Proceeding"). The Creditors Committee Adversary Proceeding was settled and compromised pursuant to the Stipulation and Order Dismissing Committee Adversary Proceeding and Allowing Secured and Unsecured Claims of Pre-Petition Lender and Wachovia Bank, National Association dated June 7, 2002 (the "Committee Stipulation"), which was approved by the Court by Order dated July 17, 2002. Pursuant to the Committee Stipulation, the Pre-Petition Bank Group was granted an Allowed Claim in the amount of $77,660,000.00, of which not less than $40,000,000 shall be deemed an Allowed Secured Claim and the balance of which shall be deemed an Allowed Unsecured Claim. In addition, the Swap Lender has, pursuant to the Committee Stipulation and this Plan, an Allowed Secured Claim in the amount of $113,119[3] and an Allowed Unsecured

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[3] Pursuant to the Committee Stipulation, the Swap Lender was granted an Allowed Secured Claim in the amount of $83,379. The remainder of the Swap Lender's Claim is allowed pursuant hereto.

Claim in the amount remaining unpaid after payment to the Swap Lender of its proportionate share of the $40,000,000 to be paid to the Pre-Petition Agent.

In accordance with the Committee Stipulation, under the Plan, the Pre-Petition Agent, on behalf of the Pre-Petition Bank Group and the Swap Lender will receive, to the extent of the total of their Allowed Secured Claim, after the Administrative Expense Fund (or, after the Effective Date, the Distribution Fund) has been funded up to the amount of approximately $26.7 million (the "Administrative Claim Deduction"), the first funds received by the Estate until the Pre-Petition Bank Group and the Swap Lender have received the total amount of $40,000,000; provided, however, that the proceeds of Avoidance Actions distributed to the Pre-Petition Bank Group and the Swap Lender shall be limited to the amount of the Administrative Claim Deduction. Pursuant to paragraphs 3, 9 and 10 of the Committee Stipulation, proceeds of the Sale and proceeds of Avoidance Actions collected by the Estate after the Pre-Petition Bank Group and the Swap Lender have received $40,000,000 in the aggregate shall be deposited into the Distribution Fund. The timing of payments to the Pre-Petition Bank Group shall be as set forth in the Stipulation and the Committee Stipulation. This Class is impaired and is entitled to vote on the Plan.

Section 3.6. Class 6 - Unsecured Creditors. The funds, if any, remaining in the Distribution Fund after (i) payment of all Allowed Claims in Classes 1, 2, 3 and 4, (ii) payment to the Pre-Petition Bank Group and the Swap Lender in the total amount of $40,000,000.00 shall be paid to Unsecured Creditors *pro rata* based upon the amount of their Allowed Claims; provided, however, that as provided in paragraph 10 of the Committee Stipulation, the Subordination Agreements shall be enforced such that the Pre-Petition Bank Group and the Swap Lender shall receive not less than 68% (in the aggregate) of every dollar available for distribution to Unsecured

Creditors until the Pre-Petition Bank Group's Allowed Unsecured Claim and the Swap Claim are paid in full; and provided further that no De Minimus Distributions shall be made, as set forth in Section 6.10. This Class is impaired and is entitled to vote on the Plan.

Section 3.7. Class 7 - Holders of Equity Interests. Holders of Equity Interests will not receive any payment or have any interest in the Assets or any proceeds therefrom on account of their interests. Pursuant to § 1126(g) of the Code, holders of Equity Interests will be deemed to reject the Plan because they will not receive any distribution under the Plan. As a result, the Plan need not be submitted to this Class for a vote.

ARTICLE IV.

Executory Contracts and Unexpired Leases

All executory contracts and unexpired leases of Debtors not previously assumed or rejected shall be rejected if not assumed by the applicable deadlines established pursuant to the Court's four (4) Orders each dated September 21, 2001 (as such deadlines may have been modified or extended) extending the time within which Debtors may assume and assign or reject unexpired leases of real estate, equipment leases and executory contracts. Any Claim resulting from any such rejection shall be treated as a Class 6 Unsecured Claim. Any person or entity with a Claim against the Debtors for damages due to the rejection of any executory contract or unexpired lease shall file a proof of claim for such damages by no later than the Effective Date or such Claim shall be forever barred and shall not be enforceable against the Debtors or its property.

ARTICLE V.

Implementation

Section 5.1. Estate Representative. As of the Effective Date, the Estate Representative shall serve as the representa

APPENDIX E

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Filed November 21, 2002]

Chapter 11 Case
Jointly Administered
Case Nos. -01-83470, 01-83472, 01-83474, 01-83475
Hon C. Ray Mullins
Adversary Proceeding No. 02-06454

In re:
ATLANTA RETAIL, INC., f/k/a WOLF CAMERA, INC. *et al.*,
Debtors.

ATLANTA RETAIL, INC., f/k/a WOLF CAMERA, INC., ATLANTA RETAIL SUBSIDIARY, LLC, f/k/a WOLF XPRESS.COM, LLC, ATLANTA RETAIL, L/P, f/k/a TEXAS PHOTO FINISH, L/P, and ATLANTA RETAIL PARTNER, INC., f/k/a FOX PHOTO PARTNER, INC., and WACHOVIA BANK NATIONAL ASSOCIATION,

Plaintiffs,

vs.

THE EASTMAN KODAK COMPANY,
Defendant.

ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

This matter is before the Court on the Motion of Debtors and Wachovia Bank National Association ("Wachovia") (hereinafter jointly referred to as "Plaintiffs") for a Preliminary Injunction seeking to enjoin Defendant Eastman

Kodak Company ("Kodak") from prosecuting an action in the United States District Court for the Western District of New York initiated by Kodak against Wachovia (*Eastman Kodak Company vs. Wachovia Bank, N.A.*, Civil Action No. 02CV 6441 T(F)) (the "New York Action") or from initiating any new action or proceeding in any court other than this court against the Debtors, Wachovia, or the Pre-Petition Secured Lenders on account of, or in connection with, claims or causes of action which refer or relate to the same nucleus of operative facts as set forth in the New York Action, the Kodak Agreements, the 1998 Subordination Agreement or the Pre-Petition Loan Documents (each as defined in the Complaint).

On November 12, 2002, the Court conducted a hearing on the Plaintiffs' Motion with due and adequate notice to all parties. Each of the parties appeared at the hearing and was represented by counsel. For all of the reasons stated at the hearing, which reasons are incorporated herein by reference in accordance with Federal Rule of Bankruptcy Procedure 7052(a), and based upon the pleadings, exhibits and arguments of the parties, it is HEREBY ORDERED

INJUNCTION

1. Plaintiff's Motion for Preliminary Injunction is GRANTED and shall remain in effect until further Order of this Court.

2. In furtherance of the preliminary injunction granted pursuant to this Order, Kodak is hereby directed to take all steps reasonably necessary to stay, for all purposes, the New York Action, including, without limitation, extending Wachovia's time to answer the complaint in the New York Action. Such stay and extension of time to answer shall continue until a final, non-appealable order and judgment has been entered in this adversary proceeding.

SCHEDULING MATTERS

3. Kodak shall file and serve its motion to dismiss the Complaint (the "*Dismissal Motion*") by no later than December 16, 2002.

4. Plaintiffs shall file and serve their (i) response to the Dismissal Motion, and (ii) cross-motion for summary judgment (the "*Summary Judgment Motion*") by no later than January 20, 2003.

5. Kodak shall file and serve any reply to Plaintiffs' response to the Dismissal Motion by no later than January 30, 2003.

6. Kodak shall file and serve its response to the Summary Judgment Motion by no later than February 14, 2003.

7. Plaintiffs shall file and serve any reply to Kodak's response to the Summary Judgment Motion by no later than February 24, 2003.

8. By no later than February 28, 2003, the parties shall exchange lists of (i) any witnesses to testify, and (ii) any documents, exhibits or other evidence that may be introduced at the hearing with respect to this Adversary Proceeding (the "*Hearing*"). To the extent not previously produced, the parties shall exchange copies of any exhibits, documents or other evidence to be introduced at the Hearing by no later than February 28, 2003.

9. Any witnesses identified by any party in accordance with paragraph 8 hereof shall be made available for deposition either in Atlanta, Georgia or in New York, New York, at the option of the witness, at the offices of the witness's counsel, between March 3, 2003 and March 7, 2003.

10. All parties reserve the right to object to any discovery request by any party (including, without limitation, any request for deposition or production of documents), the relevance of any exhibit, document or other evidence sought

to be introduced at the Hearing, and to seek a protective order with respect to any request for discovery by any party, provided, however, that any objection or motion for such protective order shall be brought in this Court prior to the Hearing; and provided further, however, that no party shall object to the authenticity of any document previously introduced into evidence at any prior hearing before this Court.

11. The parties agree that discovery in connection with the Hearing shall be limited to the exchange of documents, exhibits and other evidence designated for the Hearing and the depositions of any witnesses identified in accordance with paragraph 8 hereof. All other discovery in connection with the Hearing is waived. Documents, exhibits and other evidence and the testimony of witnesses not identified in accordance with paragraph 6 hereof shall not be admissible at the Hearing, provided, however, that the parties may supplement such disclosure to identify other documents, exhibits or evidence relied upon, referred to or disclosed during any deposition taken in accordance with paragraph 9 hereof. Any such supplemental disclosure shall be exchanged no later than 72 hours before the commencement of the Hearing.

14. The Hearing shall be held on March 25 2003, at 10:00 o'clock, a.m. in Courtroom 1203 Richard Russell Building, 75 Spring Street, Atlanta, GA 30303.

15. All motions and other papers referred to herein may be served electronically and shall be served so as to be received by all parties by no later than 5:00 p.m. on the due date identified herein.

16. The schedule and deadlines set forth herein may not be revised or extended without the permission of this Court.

This 19th day of November, 2002.

/s/ C. Ray Mullins
HON. C. RAY MULLINS
United States Bankruptcy Judge

Prepared by:

/s/ Mary Grace Diehl
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Georgia Bar No. 221712
Counsel for Wachovia Bank N.A.

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Number of labels for parties shown above: 9

Pursuant to Fed. R. Bank. P. 9022 and 7005, I certify that on the date stated below, I served a copy of the foregoing document(s) on each of the persons and entities named in the foregoing list either by United States Mail at the respective addresses shown or, if an attorney subscribes to a mail pick-up box in the Clerk's Office, by placing a copy in such attorney's mail pick-up box.

Date: 11-21-02

W. Yvonne Evans, Clerk of Court
By: Lula Collins
Lula Collins (COLLINSL)

APPENDIX F

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Entered July 18, 2002]

CHAPTER 11

CASE NOS.: 01-83470, 01-83472 01-83474 and 01-83475

JUDGE MULLINS

Jointly Administered under 01-83470

Adversary No. 02-06018

In re: ATLANTA RETAIL, INC. f/k/a WOLF CAMERA, INC.
Debtors.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF ATLANTA RETAIL, INC. f/k/a WOLF CAMERA, INC.,
Plaintiff,

v.

FIRST UNION NATIONAL BANK, as administrative agent,
Defendant.

STIPULATION AND ORDER DISMISSING COMMITTEE ADVERSARY PROCEEDING AND ALLOWING SECURED AND UNSECURED CLAIMS OF PRE-PETITION LENDERS AND WACHOVIA BANK, NATIONAL ASSOCIATION

WHEREAS:

A. The above captioned debtors (the "Debtors") filed their respective voluntary petitions for relief under Chapter 11 of the Bankruptcy Code on June 21, 2001 (the "Petition Date") and have continued to operate their businesses and manage their affairs as debtors-in-possession.

B. On June 26, 2001, an official committee of unsecured creditors (the "Committee") was appointed in the cases.

C. This Court has jurisdiction over these bankruptcy cases and this adversary proceeding pursuant to 28 U.S.C. §§151, 157(b)(2) and 1334.

D. The Debtors' pre-petition operations were financed pursuant to a certain Credit Agreement, dated as of September 1, 1998 (as amended, the "Pre-Petition Credit Agreement"), among Debtors, First Union National Bank,[1] on its own behalf and as administrative agent ("Wachovia" or the "Pre-Petition Agent") for the lenders (the "Pre-Petition Secured Lenders"), and the Pre-Petition Secured Lenders, which provided for, among other things, a revolving credit facility in the original principal amount of $130 million and a term loan facility in the principal amount of $20 million.

E. Pursuant to that certain interest rate Swap Transaction Confirmation, dated as of September 15, 1998 (the "Swap Agreement"), between Atlanta Retail, Inc., f/k/a Wolf Camera Inc. ("ART") and Wachovia (the "Swap Lender"), ARI agreed to pay a fixed interest rate of 5.44% on a notional amount of $30,000,000 to Wachovia in monthly installments on the fifth day of each month commencing November 5, 1998 through the Termination Date (as defined in the Swap Agreement). The Swap Agreement was terminated by Wachovia on or about July 31, 2001. As of the Petition Date, ARI was indebted to Wachovia in connection with the Swap Agreement in the aggregate principal amount of $113,018.75 (the "Swap Indebtedness").

F. As of the Petition Date, the Debtors were indebted to the Pre-Petition Secured Lenders, pursuant to the Pre-Petition Credit Agreement, in the principal amount of not less than

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[1] As of April 1, 2002, First Union and Wachovia Bank, N.A. merged and First Union has changed its name to Wachovia Bank, National Association.

577.660,000, plus interest, fees, costs and expenses as provided thereunder (the "Pre-Petition Credit Agreement Indebtedness" and, together with the Swap Indebtedness, the "Pre-Petition Indebtedness").

G. Pursuant to the Master Guaranty, dated September 1, 1998, each of the Debtors guaranteed the obligations of each of the other Debtors under the Pre-Petition Credit Agreement and the Swap Agreement.

H. Pursuant to the Master Security Agreement, dated as of September 1, 1998, all obligations under the Pre-Petition Credit Agreement and the Swap Agreement were secured by substantially all of the Debtors' assets, including inventory, receivables and intellectual property, but excluding leases and fixtures.

I. As of the Petition Date, the Debtors were indebted to Eastman Kodak Company ("Kodak") in the aggregate principal amount of not less than $70 million plus interest, fees, costs and expenses (the "Kodak Indebtedness") as provided pursuant to, among other things, (i) the Kodak Loan Agreement, (ii) the Kodak Note,(iii) the Kodak Subordination Agreement, (iv) the Kodak Intercreditor Agreement, (v) the Subordinated Note Purchase Agreement and (vi) all subrogation, contribution, indemnity or similar rights which Kodak had or may have against Debtors arising from the payment made by Kodak under the Kodak Guaranty (each as defined in the Pre-Petition Credit Agreement and, collectively, the "Kodak Agreements").

J. As of the Petition Date, general unsecured claims against the Debtors (including the Kodak Indebtedness, but excluding any portion of the Pre-Petition Indebtedness) aggregated approximately $120 million.

K. The Pre-Petition Agent asserts that, pursuant to the Kodak Agreements, the Kodak Indebtedness is subordinated in right of payment to the prior payment in full of the Pre-

Petition Indebtedness and all distributions in respect of the Kodak Indebtedness are to be paid to the Pre-Petition Secured Lenders until the Pre-Petition Indebtedness has been paid in full.

L. Pursuant to a motion dated June 21, 2001 (the "DIP Motion"), the Debtors sought an order (i) to obtain post-petition financing, pursuant to Sections 105, 361, 362, 363, 364(c)(1), (c)(2), (c)(3) and (d)(1), up to the principal amount of $10 million (the "DIP Financing") from Wachovia and a syndicate of financial institutions (together with Wachovia, the "Post-Petition Lenders") with Wachovia acting as agent (the "Post-Petition Agent") for the Post Petition Lenders; (ii) to utilize cash collateral and other collateral of the Pre-Petition Secured Lenders; and (iii) to provide adequate protection to the Pre-Petition Secured Lenders.

M Pursuant to an order entered on July 27, 2001 (the "Final Order"), the DIP Motion was approved on a final basis.

N Pursuant to the Final Order, the Debtors borrowed in excess of $8 million from the Post-Petition Lenders and used Cash Collateral and other collateral of the Pre-Petition Secured Lenders including the priming of the liens and security interests of the Pre-Petition Secured Lenders.

O The Final Order authorized the Debtors to use Cash Collateral and other collateral of the Pre-Petition Secured Lenders and to provide adequate protection to the Pre-Petition Secured Lenders including:

> 14. . . . a security interest and lien upon all of the Collateral (i) immediately junior only to the security interests and liens granted to the Postpetition Agent for the benefit of the Postpetition Lenders in this Order and pursuant to the Documents in respect of the Postpetition Financing and (ii) subject to the Carve-Out, (B) are granted a superpriority allowed claim pursuant to Sec-

tion 507(b) of the Bankruptcy Code, (i) immediately junior to the claims under Section 364(c)(1) of the Bankruptcy Code held by the Postpetition Agent and the Postpetition Lenders as set forth in paragraph 10, (ii) payable from and have recourse to, in addition to the property of the Debtors that is made subject to the security interests and liens of the Postpetition Agent on behalf of the Postpetition Lenders as set forth in paragraph 12 of this Order, any unencumbered pre- and postpetition property of the Debtors, including, without limitation, any amounts that are recovered or otherwise received by the Debtors in respect of claims under Sections 502(d), 544, 545, 547, 548, 549, 550 or 551 of, or any other avoidance actions under, the Bankruptcy Code.

P. In addition, the Final Order provided that no borrowings, letters of credit, Cash Collateral, collateral, the Carve-Out or the Trustee Carve-Out (each as defined therein) may be used by any party to object to, contest, raise any defense to the validity, priority, extent or enforceability of the Pre-Petition Indebtedness or the DIP Financing or to assert any claims against the Pre-Petition Agent, the Pre-Petition Secured Lenders, the Post-Petition Agent or the DIP Lenders.

Q. Pursuant to motion dated August 23, 2001 (the "APA Motion"), the Debtors sought an order, *inter alia*, approving the Asset Purchase Agreement between the Debtors and Ritz Camera Centers Inc. ("Ritz"), pursuant to which Ritz would acquire substantially all of the Debtors' assets (the "Ritz Sale").

R. Pursuant to a motion, dated September 13, 2001 (the "Stipulation Motion"), the Debtors and the Pre-Petition Agent sought an order, *inter alia*, approving the Revised Stipulation With Respect to Distribution of Proceeds from Sale of Assets of Debtors (the "Stipulation")

S. This Court, over the objections of the Committee and Kodak, granted the APA Motion and the Stipulation Motion pursuant to orders entered on September 21 and 26, 2001, respectively (the "Sale and Stipulation Orders").

T. As of the closing of the Ritz Sale, $5,706,016.66 was due to the DIP Lenders pursuant to the DIP Financing.

U. Pursuant to the Sale and Stipulation Orders, the proceeds of the Ritz Sale were to be distributed as follows:

(a) first, to satisfy all outstanding obligations under the DIP Financing;

(b) second, $20 million to reduce the Pre-Petition Indebtedness;

(c) third, up to the next $21 million to fund the Administrative Expense Fund; and

(d) the balance (including amounts not expended from the Administrative Expense Fund), to reduce the Pre-Petition Indebtedness, up to an aggregate of at least $36 million on account of the secured portion of such indebtedness.[2]

V. Pursuant to the Sale and Stipulation Orders, as additional adequate protection and in consideration for funding the Administrative Expense Fund, the Pre-Petition Secured Lenders were granted a first priority claim against the proceeds of any avoidance action recoveries (up to the aggregate amount deposited into the Administrative Expense

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[2] As of the date hereof, the Administrative Expense Fund has been funded in the amount of $19.7 million. In addition, the Pre-Petition Secured Lenders have agreed that (i) proceeds of assets subject to their security interests and liens, up to $3.45 million, and (ii) other proceeds up to $2 million (after payment to the Pre-Petition Agent of $36 million as set forth above) may be used to fund the Administrative Expense Fund up to $25 million.

Fund) and any surplus remaining in the Administrative Expense Fund after payment of permitted expenses.

W. The Pre-Petition Secured Lenders assert that the value of inventory, accounts receivable and other miscellaneous assets conveyed to Ritz pursuant to the Ritz Sale which are subject to valid and duly perfected liens of the Pre-Petition Secured Lenders is at least $52.5 million.

X. The Committee asserts that the value of inventory, accounts receivable and other miscellaneous assets conveyed to Ritz pursuant to the Ritz Sale which are subject to valid and duly perfected liens and security interests of the Pre-Petition Secured Lenders is less than $36 million.

Y. The Debtors estimate that they have avoidance and other actions against creditors and others in the aggregate face amount of in excess of $20 million (the "Avoidance Actions").

Z. The only assets which may be available to satisfy the Pre-Petition Indebtedness are expected to be derived from the Ritz Sale and the net proceeds of Avoidance Actions.

AA. As of the date of this Stipulation, the Pre-Petition Secured Lenders and the Swap Lender have received approximately $21.5 million (in the aggregate) on account of their Pre-Petition Secured Claim and the Swap Claim (each as defined herein)

BB. On January 28, 2002, the Committee filed a complaint (the "Complaint") against the Pre-Petition Agent seeking (i) to avoid certain claims of the Pre-Petition Agent pursuant to 11 U.S.C. § 544, (ii) a hearing to value the assets sold pursuant to the Ritz Sale, (iii) a surcharge against collateral securing the Pre-Petition Secured Claim, and (iv) a judgment that the Pre-Petition Secured Lenders are not entitled to payment of proceeds from the Debtors' remaining assets.

CC. In order to avoid the expense, delay and disruption of protracted discovery and litigation concerning the issues raised in the Complaint, the parties have agreed to a consensual resolution of the matter on the terms and conditions set forth herein.

NOW, THEREFORE, IT IS HEREBY STIPULATED, CONSENTED TO, AGREED AND SO ORDERED:

1. This Stipulation shall become effective on the date (the "Effective Date") on which it has been signed by the Debtors, the Pre-Petition Agent, the Swap Lender and the Committee and approved by the Court.

2. Upon the occurrence of the Effective Date of this Stipulation, the Complaint is hereby withdrawn and dismissed with prejudice with respect to all claims or causes of action raised or which could have been raised against any of the Pre-Petition Secured Lenders, the Pre-Petition Agent and the Swap Lender by the Committee. The Committee shall, within 5 business days of the Effective Date, file any pleading or other document necessary to effectuate such dismissal.

3. The Pre-Petition Secured Lenders are hereby granted and shall have an allowed claim in the amount of $77,660,000.00 (the "Pre-Petition Lenders' Allowed Claim"), of which, solely for purposes of effectuating the settlement contemplated herein between the Pre-Petition Secured Lenders, the Committee and the Debtors and for calculating distributions on account of the Pre-Petition Indebtedness and general unsecured claims, not less than $40 million of the Pre-Petition Indebtedness is hereby deemed and allowed as a secured claim with recourse to all pre- and post-petition property of the Debtors' estates (the "Pre-Petition Lenders' Allowed Secured Claim"), and not more than $37,660,000 of the Pre-Petition Indebtedness is hereby deemed and allowed as an unsecured claim (the "Pre-Petition Lenders' Allowed Unsecured Claim"). *The* Pre-Petition Secured Lenders ex-

pressly reserve the right to assert that the value the property securing the Pre-Petition Indebtedness exceeds $40 million in the event and to the extent any creditor or party in interest seeks to assert a claim which is senior to either the Pre-Petition Lenders' Allowed Secured Claim or the Pre-Petition Lenders' Allowed Unsecured Claim.

4. The Swap Lender is hereby granted and shall *have* an allowed secured claim in the amount of $83,379 (the "Swap Claim").

5. Except for claims or causes of action arising from this Stipulation and Order, the Committee and the Debtors hereby release each of the Pre-Petition Secured Lenders, the Pre-Petition Agent, the Post-Petition Agent, the Post-Petition Lenders and the Swap Lender from all past, present and future claims, counterclaims, offsets, or causes of action, known or unknown, liquidated or unliquidated, vested or contingent, from the beginning of the world to the date of this Stipulation which have been or could have been asserted in the Complaint or the Debtors' bankruptcy cases, or which refer or relate to the Debtors, their bankruptcy cases or their estates, including without limitation, claims arising out of or related to the Post-Petition Financing, the Pre-Petition Indebtedness, the Pre-Petition Credit Agreement, the Swap Agreement, the Pre-Petition Lenders' Allowed Claim, the Pre-Petition Lenders' Allowed Secured Claim, the Pre-Petition Lenders' Allowed Unsecured Claim or the Swap Claim.

6. The Pre-Petition Agent, on its behalf and on behalf of each of the Pre-Petition Secured Lenders, the Post-Petition Agent, the Post-Petition Lenders and the Swap Lender hereby release the Committee and each of the Debtors from all past, present and future claims, counterclaims, offsets, or causes of action, known or unknown, liquidated or unliquidated, vested or contingent, from the beginning of the world to the date of this Stipulation which have been or could have been asserted in this adversary proceeding or these bankruptcy cases, or

which refer or relate to the Debtors, their bankruptcy cases or their estates, including without limitation, claims arising out of or related to the Post-Petition Financing, the Pre-Petition Indebtedness, the Pre-Petition Credit Agreement, the Swap Agreement, the Pre-Petition Lenders' Allowed Claim, the Pre-Petition Lenders' Allowed Secured Claim or the Pre-Petition Lenders' Allowed Unsecured Claim, except for (i) claims allowed pursuant to this Stipulation, (ii) claims or causes of action which refer or relate to the subordination of the Kodak Indebtedness pursuant to the Kodak Agreements and (iii) claims or causes of action arising from or preserved by this Stipulation and Order.

7. The Committee and each of the Debtors expressly waives any and all past, present and future claims, counter-claims, offsets, or causes of action, known or unknown, liquidated or unliquidated, vested or contingent, from the beginning of the world to the date of this Stipulation which have been or could have been asserted against the Pre-Petition Secured Lenders, the Pre-Petition Agent, the Post-Petition Agent, the Post-Petition Lenders or the Swap Lender in this adversary proceeding or these bankruptcy cases, or which refer or relate to the Debtors, their bankruptcy cases or their estates, including without limitation, claims arising out of or related to the Post-Petition Financing, the Pre-Petition Indebtedness, the Pre-Petition Credit Agreement, the Swap Agreement, the Pre-Petition Lenders' Allowed Claim, the Pre-Petition Lenders' Allowed Secured Claim or the Pre-Petition Lenders' Allowed Unsecured Claim, including, without limitation, any claims or defenses under Bankruptcy Code §§502, 503, 506, 542, 545, 547, 548, 549, or any other claims to surcharge any of the collateral securing the Pre-Petition Secured Claim or the Post-Petition Financing or the Swap Claim.

8. The Committee and each of the Debtors expressly agree that no portion of the Pre-Petition Lenders' Allowed

Claim, the Pre-Petition Lenders' Allowed Secured Claim, the Swap Claim, the Pre-Petition Lenders' Allowed Unsecured Claim, the Swap Indebtedness or the Post-Petition Financing is subject to avoidance or subordination under the Bankruptcy Code or applicable non-bankruptcy law.

9. After the Administrative Expense Fund has been funded in the amount of up to $25,000,000, as provided in the Sale and Stipulation Orders, the Debtors shall pay to the Pre-Petition Agent (on behalf of the Pre-Petition Secured Lenders and the Swap Lender) the first funds recovered by the Debtors' estates up to the amount of $18,500,000.00 for a total amount to be paid to the Pre-Petition Agent from the proceeds of the Ritz Sale, Avoidance Actions and other assets of $40,000,000.00, which funds shall be applied against the Pre-Petition Lenders' Allowed Secured Claim and the Swap Claim, as such funds are received from any source, including, without limitation, proceeds of the Ritz Sale, proceeds of other asset sales (including proceeds from the sale of tangible and intangible property, leases and fixtures), recoveries (net of litigation expenses) obtained in connection with the litigation of avoidance or other actions, other amounts as more specifically described in the Stipulation and any surplus remaining in the Administrative Expense Fund after payment of permitted expenses. Except as otherwise provided herein, the Stipulation shall not be amended or modified hereby and shall remain in full force and effect.

10. Subject to the provisions of paragraph 3 hereof, after payment in full of $18,500,000.00 to the Pre-Petition Agent (on behalf of the Pre-Petition Secured Lenders and the Swap Lender) as set forth in the immediately preceding paragraph, the Pre-Petition Secured Lenders and the Swap Lender shall share, on a pro rata basis, with general unsecured creditors in the remaining general distribution of Debtors' assets, giving full force and effect to the Kodak Subordination Agreement, pursuant to which, the Pre-Petition Secured Lenders and the

Swap Lender shall receive not less than 68% (in the aggregate) of every dollar available for distribution pursuant to the general distribution until the Pre-Petition Secured Lenders' Allowed Unsecured Claim and the Swap Claim are paid in full.

11. The Committee does not object to the enforcement of the Kodak Subordination Agreement as set forth herein, *provided*, however, that Kodak shall have notice and an opportunity to be heard with respect to such enforcement.

12. The automatic stay imposed pursuant to Bankruptcy Code §362 is vacated and modified to the extent necessary to permit the Debtors, the Pre-Petition Agent, the Swap Lender, the Post-Petition Agent and the Committee to take all action necessary to effectuate the terms of this Stipulation.

13. This Stipulation cannot be amended or modified except by a writing executed by all parties hereto and approved by the Court. This Stipulation shall be binding upon the Debtors, the Pre-Petition Agent, the Pre-Petition Lenders, the Post-Petition Agent, the Post-Petition Lenders, the Swap Lender the Committee and their respective successors and assigns, including any Chapter 7 or Chapter 11 trustee hereinafter appointed for the Debtors' estates.

14. This Stipulation may be executed in one or more counterparts (including by facsimile), all of which shall be considered one and the same agreement.

15. If this Stipulation is not approved by the Court, this Stipulation shall be of no further force and effect, and neither this Stipulation nor any negotiations or writings in connection with this Stipulation shall in any way be construed as or deemed to be evidence of or an admission on behalf of the Debtors, the Pre-Petition Agent, the Pre-Petition Secured Lenders, the Post-Petition Agent, the Post-Petition Lenders, the Swap Lender or the Committee regarding matters dealt with herein.

16. If any provision of this Stipulation is held to be invalid, unlawful or incapable of being enforced for any reason whatsoever, all other provisions, that can be given effect without the invalid, unlawful or unenforceable provision shall, nevertheless, remain in full force and effect.

June __, 2002

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Co-counsel for Wachovia Bank, National Association, f/k/a First Union National Bank, as Pre-Petition Agent for the Pre-Petition Lenders and as Post-Petition Agent for the Post-Petition Lenders and as co-counsel for the Swap Lender

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Attorneys for the Debtors

SO ORERED:

This 17th day of July, 2002
/s/ C. Ray Mullins
UNITED STATES BANK BANKRUPTCY JUDGE

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Number of labels for parties shown above: 9

Pursuant to Fed. R. Bank. P. 9022 and 7005, I certify that on the date stated below, I served a copy of the foregoing document(s) on each of the persons and entities named in the foregoing list either by United States Mail at the respective addresses shown or, if an attorney subscribes to a mail pick-up box in the Clerk's Office, by placing a copy in such attorney's mail pick-up box.

Date: 7-18-02

W. Yvonne Evans, Clerk of Court
By: /s/ Lula Collins
Lula Collins (COLLONSL)

APPENDIX G

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Filed September 26, 2001]

Chapter 11
Jointly Administered
Case Nos. 01-83470, 01-83472 01-83474, 01-83475
Judge C. Ray Mullins

In re: WOLF CAMERA, INC., a Georgia Corporation,
Tax ID No. 58-1210910 and affiliates,
Debtors.

ORDER GRANTING JOINT MOTION OF DEBTORS AND FIRST UNION NATIONAL BANK TO APPROVE STIPULATION WITH RESPECT TO DISTRIBUTION OF PROCEEDS FROM SALE OF THE DEBTORS, AS AMENDED

Before the Court is the Joint Motion of Debtors and First Union National Bank to Approve Stipulation with Respect to Distribution of Proceeds from Sale of Assets of Debtors (the "Joint Motion"), filed September 12, 2001, as amended by Amendment to Joint Motion of Debtors and First Union National Bank to Approve Stipulation with Respect to Distribution of Proceeds From Sale of Assets of Debtors (the "Amended Joint Motion"), filed September 13, 2001. The Joint Motion, as amended by the Amended Joint Motion (the "Joint Motion as Amended"), seeks approval of the Revised Stipulation with Respect to Distribution of Proceeds from Sale of Assets of the Debtors (the "Revised Stipulation"), dated September 13, 2001 and attached as Exhibit A to the

Amended Joint Motion. The Joint Motion, as Amended, came on for hearing (the "Hearing") commencing September 17, 2001 at 9:30 a.m., together with Debtors' motion (the "Sale Motion") filed August 23, 2001, seeking, inter alia, an order authorizing the sale of assets pursuant to an Asset Purchase Agreement (the "Asset Purchase Agreement") among the Debtors and Ritz Camera Centers, Inc., free and clear of liens under section 363 of the Bankruptcy Code. By Order Approving Sale of Debtors' Assets Pursuant to

Asset Purchase Agreement with Ritz Camera Centers, Inc., entered September 21, 2001, this Court approved the sale of assets pursuant to the Asset Purchase Agreement, with liens to attach to the proceeds of the sale. The Joint Motion as Amended seeks approval of the Revised Stipulation dealing, inter alia, with distribution of the proceeds of the sale of assets pursuant to the Asset Purchase Agreement. After considering the evidence and arguments presented at the Hearing, for the reasons set forth by the Court in the record at the conclusion of the Hearing, the Joint Motion as Amended and the Revised Stipulation attached as Exhibit A to the Amended

Joint Motion are hereby approved.

SO ORDERED this 24th day of September, 2001.

/s/ C. Ray Mullins
C. RAY MULLINS
United States Bankruptcy Judge

Prepared and presented by:

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I certify that I served the foregoing document(s) on the attached list of parties at the addresses shown, through the United States Mail, or (as applicable) by placing a copy in the respective attorney's mailbox provided by the Clerk's Office on the 13th Floor of the United States Courthouse, Atlanta, Georgia.

Date: 9-26-01 W. Yvonne Evans, Clerk of Court

By: /s/ Lula Collins
LULA COLLINS

APPENDIX H

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[September 21, 2001]

Chapter 11

Jointly Administered

Case Nos. 01-83470, 01-83472, 01-83474 and 01-83475

Judge C. Ray Mullins

In re: WOLF CAMERA, INC., a Georgia corporation,
Tax ID No. 58-1210910, and affiliates,
Debtors.

ORDER APPROVING SALE OF DEBTORS' ASSETS PURSUANT TO ASSET PURCHASE AGREEMENT WITH RITZ CAMERA CENTERS, INC.

On June 21, 2001 (the "Petition Date"), Wolf Camera, Inc., Texas Photo Finish, L.P., WolfXpress.com, LLC, and Fox Photo Partner, Inc. (collectively, the "Debtors") filed their petitions for relief under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code"). The Debtors have remained in possession and management of their assets and businesses as debtors in possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code. By Order entered on June 22, 2001, this Court ordered that the cases be jointly administered.

On August 23, 2001, the Debtors filed a motion (the "Sale Motion") seeking, *inter alia*, entry of an Order authorizing the sale of assets pursuant to an Asset Purchase Agreement among the Debtors and Ritz Camera Centers, Inc. ("Ritz")

(the "Asset Purchase Agreement")[1] free and clear of liens under section 363 of the Bankruptcy Code. In the Sale Motion, Debtors assert that they, in consultation with their secured lenders (the "Banks"), determined that it was in the best interest of Debtors, their estates and creditors to accept the offer of Ritz for the purchase of substantially all of Debtors' assets, subject to higher or otherwise better offers (the "Proposed Sale"). In the Sale Motion, the Debtors seek authorization pursuant to §§ 105, 363, and 1146(c) of the Bankruptcy Code and Rules 2002, 6004, and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") to sell substantially all of their assets owned in connection with the Debtors' business, free and clear of liens, claims, charges, equities, licenses, restrictions, encumbrances and the like, including, without limitation, any liens or security interests claimed by the Banks, by Eastman Kodak Company ("Kodak"), or any other junior subordinated lienholder (the "Subordinated Creditors") and any other purported secured creditor or lienholder, in accordance with the bid procedures proposed by the Debtors in the Sale Motion. Pursuant to the Sale Motion, Debtors also sought expedited determination of the form and manner of notice of an auction procedure and overbid procedures and expedited consideration of the approval of a break-up fee and expense reimbursement (collectively, the "Break-Up Fee") in favor of Ritz pursuant to the Asset Purchase Agreement. Further, because the Proposed Sale involves the transfer of certain executory contracts and unexpired leases, the Sale Motion requested that the Court establish procedures for the assumption and assignment of unexpired leases and executory contracts to be transferred and the rejection of those that are not. All issues relating to the assumption and assignment of unexpired leases and executory contracts, or to their rejection,

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[1] Unless otherwise defined herein, capitalized terms used herein shall have the meanings ascribed to them in the Asset Purchase Agreement.

are determined in separate Orders of the Court entered contemporaneously herewith.

Debtors provided a copy of the Sale Motion to: a) the Official Service List established in this case; b) each party that has claimed an interest in the assets being sold; c) all entities known to the Debtors to have expressed a *bona fide* interest (in the Debtor's reasonable business judgment) in a transaction with respect to any of Debtors' assets during the past six months; d) all governmental taxing authorities who have, or as a result of the sale of the Assets may have, claims, contingent or otherwise, against any Debtor; e) all creditors and parties who have filed notices of appearance in this case; and f) governmental, labor, and environmental entities.

On August 23, 2001, the Court entered an Order granting the Debtors' " Motion to Shorten Notice of Motion for Orders (A) Approving Execution of Asset Purchase Agreement; (B) Scheduling Date, Time, and Place for Hearing on Approval of the Sale of Assets Pursuant Thereto Free and Clear of Liens Under Section 363 of the Bankruptcy Code; (C) Establishing Procedures for Assumption and Assignment or Rejection of Executory Contracts Pursuant to Section 365 of the Bankruptcy Code; (D) Prescribing Form and Manner of Notice of Sale Hearing and Terms for Submission of Competing Offers and Overbid Procedures; and (E) Approving Break-Up Fee and Expense Reimbursement Provisions of Asset Purchase Agreement." The Order modified the notice requirements of Bankruptcy Rules 2002 and 6004, to the extent required, to permit the Debtors to serve a proposed Sale Notice containing a summary of the terms contemplated by the Sale Motion (a copy of which proposed Sale Notice was attached as Exhibit "A" to the Debtors' Motion) on all creditors no later than August 24, 2001.

On August 23, 2001, the Debtors served the "Notice of Motion to Sell Substantially All of Debtors' Assets, Establish Procedures Therefor and of Hearings Thereon" (the "Sale

Notice"). As reflected in Certificates of Service filed with the Court, the Debtors have served a copy of the Sale Notice on all parties to whom Debtors provided a copy of the Sale Motion, all creditors of the Debtors, including the Banks, the Subordinated Creditors, the U.S. Trustee, and all parties known to be asserting any security interest, lien, license, or title interest in the Debtors' Assets. The Court finds that the notice provided by Debtors constitutes good and sufficient notice of the Sale Motion, and that no other or further notice is needed. The Sale Notice notified interested parties of two hearings: (1) an August 30, 2001 hearing (the "Sale Procedures Hearing") to approve the Asset Purchase Agreement, to approve sale procedures (including procedures for the submission of competing offers and the conduct of an auction and procedures relating to the rejection or assumption and assignment of unexpired leases and executory contracts) and to approve the Break-Up Fee and Expense Reimbursement provisions of the Asset Purchase Agreement; and (2) a September 17, 2001 hearing (the "Sale Hearing") on the Sale Motion. The Sale Notice further notified interested parties of a deadline of September 10, 2001, to object to the relief sought in the Sale Motion and notified interested parties that the Debtor would conduct an auction for the sale of substantially all of their assets on September 14, 2001.

On August 31, 2001, following the Sales Procedure Hearing conducted on August 30, the Court entered its "Order with Regard to Bidding Procedures for Sale of All of the Debtors' Assets and Expense Reimbursement Provisions of Asset Purchase Agreement with Ritz Camera Centers, Inc." (the "Procedures Order"). In the Procedures Order, the Court approved the Bidding Procedures proposed by the Debtor as modified by the Court at the Sales Procedures Hearing on August 30, 2001. The Court found that the Bidding Procedures were fair and increased the likelihood of achieving maximum value for the Debtors' Assets. Pursuant to the approved Bidding Procedures, Debtors were authorized to

conduct an auction (the "Auction") beginning at 11:00 A.M., Eastern Time, on September 14, 2001 at the offices of Powell, Goldstein, Frazer & Murphy LLP, 191 Peachtree Street, 16th Floor, Atlanta, Georgia 30303.

The Debtors received no bids (other than the bid made by Ritz pursuant to the Asset Purchase Agreement) prior to the bidding deadline of September 10, 2001, and no other bidders appeared to bid at the time and place scheduled for the auction on September 14, 2001. The Debtors have reported that the only, and therefore the highest and best, bid for the Purchased Assets was submitted by Ritz Camera Centers, Inc. in the amount of $84,700,000.00 (the Purchase Price as set forth in the Asset Purchase Agreement).

The Sale Motion came on for hearing before the Court at the Sale Hearing beginning on September 17, 2001. Objections and other responses were filed by Kodak, certain landlords, certain equipment lessors, taxing authorities, other parties claiming an interest in the Purchased Assets, and the Official Committee of Unsecured Creditors (the "Committee"). Objections filed by landlords and equipment lessors are addressed in separate Orders of the Court. At the conclusion of the Sale Hearing, the Court authorized and approved, on the terms and conditions, stipulations and agreements announced on the record at the Sale Hearing, the sale of assets to Ritz.

Having considered the Sale Motion, the presentations of the parties at the Sale Hearing, and the Court's entire record in these cases, the Court has determined that the relief requested in the Sale Motion with regard to the sale of assets to Ritz should be granted and that the Debtors should be authorized to sell assets to Ritz as set forth herein on the basis of the findings of fact and conclusions of law as stated on the record at the Sale Hearing (which are hereby incorporated as

part of this Order) and the following findings of fact and conclusions of law.[2]

Findings of Fact

In addition to the factual statements set forth above and the findings of fact made on the record at the Sale Hearing, all of which are incorporated herein as findings of fact, the Court makes the following findings of fact:

1. Wolf Camera, Inc. ("Wolf Camera") directly and wholly owns or controls each of the other Debtors. Texas Photo Finish, L.P. ("Texas Photo") is a Delaware limited partnership having Wolf Camera as its general partner. Texas Photo is a tenant under certain leases for "Wolf Camera" store locations in the state of Texas. WolfXpress.com, L.L.C. ("Wolf.com") is a Georgia limited liability company having Wolf Camera as its sole member. Wolf.com operates an "e-business" related to Wolf Camera's operations. Fox Photo Partner, Inc. ("Fox Photo") is a wholly-owned subsidiary of Wolf Camera, which is no longer engaged in any active business activities but holds the sole limited partnership interest in Texas Photo.

2. Wolf Camera is a leading specialty retailer of photographic and digital imaging products and services headquartered in Alpharetta, Georgia. Wolf Camera currently operates approximately three hundred eighty-nine (389) retail stores, nearly all of which operate under the "Wolf Camera," "Fox Photo" and "Proex" brand names. Wolf Camera offers onsite photofinishing and digital processing in its stores, and the stores sell a wide variety of photographic and digital imaging equipment including traditional and digital cameras, video cameras and components, as well as film and other

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[2] Where appropriate, findings of fact shall be construed as conclusions of law and conclusions of law shall be construed as findings of fact. FED. R. BANKR. P. 7052.

accessories. Wolf Camera also sells its products and services online through a retail web site, "wolfcamera.com."

3. The Asset Purchase Agreement provides that the sale to Ritz must close no later than September 15, 2001. As permitted in the Asset Purchase Agreement, Ritz has extended the closing date to October 1, 2001. Ritz has shown that its closing deadline is required by important business considerations that directly affect the price it is willing to pay, the value of the assets being purchased, and, indeed, its ability and desire to purchase. The key consideration in this regard is the seasonality of the business, which depends on successful marketing and sales in the December holiday season for virtually all annual profits. Unless Ritz is able to close by its closing deadline, Ritz will not be able to properly stock and staff the stores it would purchase and perform transition work necessary for profitable operation and integration of the stores to be acquired. Thus, delays in closing will directly impact the benefits of the transaction to Ritz. Debtors believe that any other potential purchasers will have similar concerns. Further, Debtors are faced with a compelling time constraint with regard to the financing of their operations. Debtors' post-petition debtor-in-possession financing facility expires on September 30, 2001, and Debtors have been repeatedly advised by the Banks that no extension of such expiration will be granted. The Court finds that there are no realistic or viable alternatives to the sale to Ritz. The Court further finds that, if the sale to Ritz is not consummated, the Debtors will be required to liquidate their assets under unfavorable circumstances. If that occurs, the amounts realized will be drastically reduced and it is highly likely that the estates of the Debtors will become administratively insolvent. Because it is critical to the realization of maximum value from the Debtors' assets and to the preservation of job opportunities for many of their approximately 4,200 employees that the sale to Ritz take place and because realistic business and financing considerations require that the

sale be concluded by October 1, 2001, the Court finds that it is and has been necessary to grant the relief sought in the Sale Motion on an expedited basis.

4. At the Sale Hearing, the Debtors advised the Court that, based on the bidding and sale process, the Debtors had reached an agreement with Ritz to sell to Ritz on the terms and conditions announced at the Sale Hearing and set forth in this Order and in the Asset Purchase Agreement (together with the exhibits thereto and related documents, the "APA") the Purchased Assets listed in the APA. Ritz will acquire substantially all of the assets owned by Debtors that are used in Debtors' businesses, wherever located. The assets to be purchased are fully described in the APA and include, without limitation, cash on hand in the Assumed Lease Locations, real estate leases that Ritz desires to acquire, pre-paid rent and security deposits for leases that are assigned to Ritz, furniture, furnishings, computers, leases for leased equipment that Ritz desires to acquire, equipment (whether owned or leased), automobiles, trucks and delivery equipment, leasehold improvements, supplies, books and records of the business, all general intangibles, all instruments, documents, notes, chattel paper, trade accounts receivable and contract rights of Debtors for commercial accounts, all current and saleable inventory of the business, agreements and executory contracts that Ritz desires to acquire, and licensed software agreements that Ritz desires to acquire (collectively, the "Purchased Assets").

5. The Purchased Assets do not include: certain non-trade accounts receivable; cash, other than cash on hand in the Assumed Lease Locations; claims which Debtors may have against any third person, whether contractual or otherwise; real estate leases, personal property leases, and executory contracts not assigned and assumed; that certain License Agreement by and between Wolf Camera, Inc. and Picture Vision; certain uncollected accounts receivable (as

contemplated by the Purchase Agreement); the minutes and other corporate, partnership, and limited liability company records of Debtor; assets of Debtors disposed of in the ordinary course of business; avoidance actions available to Debtors under the Bankruptcy Code, or other applicable laws, rules, or regulations; and any asset(s) of Debtors that Ritz, in its sole discretion, decides not to acquire.

6. The purchase price to be paid under the APA is fair, reasonable, and adequate and is the only bid received for these assets.

7. The Debtors have made a diligent and determined effort to effect a business solution to their financial problems other than the sale of their assets to Ritz. Specifically, the Debtors have made serious and continuing efforts to reach agreements with their lenders and trade creditors that would permit the Debtors to reorganize and continue their businesses. The Debtors would in fact prefer to reorganize rather than sell to Ritz. Despite their efforts and preferences, however, it is clear that the Debtors cannot continue the operation of their businesses as going concerns. The sale of the assets of the Debtors pursuant to the APA is necessary and there is no reasonable alternative to such sale. Debtors also lack sufficient trade credit or commitment from major vendors to provide trade credit on a go forward basis. Although reorganization of the Debtors as a going concern is thus not possible, the prompt and effective sale of assets will facilitate a Chapter 11 liquidating plan and is in the best interests of the Debtors, their estates, and creditors. The sale as approved herein is in furtherance of effectuating a Chapter 1 1 plan that the Debtors intend to file with regard to the liquidation of the Debtors.

8. The procedures followed by the Debtors with regard to the marketing and sale of the assets were reasonably calculated to, and did, expose the assets to the market and were designed to, and did, produce the highest value possible

in the context of these cases. Among other things, the Bidding Procedures resulted in identification of likely purchasers, providing adequate notice and information to them about the sale to permit them to participate in the process if they desired, and provided sufficient time for likely purchasers to prepare and submit proposals to purchase the assets. The APA has been negotiated at arms' length and in good faith. The Debtors and Ritz have substantially complied with the Bidding Procedures in all material respects.

9. The founder of the Debtors, Charles Wolf, is a cousin of David Ritz, the Chief Executive Officer of Ritz and the son of Edward Ritz, the founder of Ritz. A condition of the APA is that Ritz and Mr. Wolf agree on a satisfactory employment contract with Ritz. This relationship and the terms of the employment contract have been adequately disclosed, and the Court finds no evidence that the family relationship, or the requirement of Mr. Wolf's employment, has tainted the bidding process or depressed the price Ritz is willing to pay. To the contrary, the Court is satisfied that, from Mr. Wolf's standpoint, he would have preferred, and actively attempted to effect, an alternative resolution for the Debtors' financial distress and that, from Ritz's standpoint, the retention of Mr. Wolf was an important and bona fide requirement of the transaction, motivated by valid and legitimate business considerations.

10. The Court specifically finds that the Debtors and Ritz have negotiated the transaction in good faith and that its terms are the result of arms' length bargaining. The Debtors could not have realized more from the assets than is being offered by Ritz.

11. The prompt sale of the Purchased Assets is important to the realization of the highest value therefrom. Delay in the sale of the Purchased Assets would result in additional expenses to the Debtors and their estates and would result in the withdrawal of the bid by Ritz. Because there is no realistic

alternative to the sale of the Purchased Assets, and because the sales procedures have produced the highest value from the Purchased Assets in the circumstances of these cases, the Court finds that adequate and reasonable notice of the sale has been given. Specifically, the Court finds that further notice would not benefit the Debtors, their estates, or creditors and that further delay would in fact be harmful to those interests.

12. The Banks have consented to the sale on the terms set forth herein.

13. The Committee filed an objection to the sale of assets to Ritz that asserted that the interests of creditors would be better served through reorganization of the Debtors. The Court finds, however, that the Committee's proposed course of action does not provide a realistic and viable alternative to the prompt sale of the Debtors' assets and that an effort to reorganize the Debtors as suggested by the Committee will likely result in the continued diminution of the estate and the liquidation of its assets under distressed circumstances.

14. Kodak filed an Objection to the sale of assets to Ritz that asserted that the proposed sale violates Kodak's Section 363(f) rights. The Court finds, however, that Kodak executed an Intercreditor Agreement dated as of September 1, 1998 among First Union National Bank, Eastman Kodak Company, and Wolf Camera, Inc., which resulted in a waiver of Kodak's Section 363(f) rights.

15. All objections filed by the Objection Deadline that have not been resolved by stipulations of the parties, by separate Orders to be entered by the Court, or by the terms of this Order are not meritorious and should be overruled.

16. The Debtors have given adequate notice of the Sale Motion and the Sale Hearing as is appropriate under the circumstances. The Debtors have served notice of the Sale Hearing on all known creditors and shareholders of the

Debtors, including all parties known to be asserting any security interest, lien, license or title interest in any of the Debtors' assets.

Conclusions of Law

Based on the findings of fact set forth above, the Court makes the following conclusions of law:

1. This Court has jurisdiction to hear and determine the Sale Motion pursuant to 28 U.S.C. § 157 and § 1334. Venue of these cases in this district is proper pursuant to 28 U.S.C. § 1409 (a). Determination of the Sale Motion is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A), (N) and (O). The statutory predicates for the relief requested herein are sections 105, 363, and 1146 (c) of the Bankruptcy Code and Bankruptcy Rules 2002, 6004, and 6006 and 9014.

2. Due and adequate notice and hearing with regard to the Sale Motion and the Sale Hearing have been provided in accordance with § 102(1) of the Bankruptcy Code and Bankruptcy Rules 2002, 6004, and 6006. A reasonable and sufficient opportunity to object or be heard regarding the relief requested in the Sale Motion has been afforded to all interested parties and entities. No other or further notice of the Sale Motion and no further hearing are required with regard to the relief afforded by this Order and with regard to the sale of the Purchased Assets. The Debtors have shown good cause for the shortening of notice otherwise required with regard to the sale of the Purchased Assets.

3. Fair, reasonable, and adequate notice of the sale of the assets has been given under the circumstances.

4. Approval of the APA and consummation of the sale of the Purchased Assets pursuant thereto are in the best interests of the Debtors, their creditors, and the Debtors' estates. The sale of the Purchased Assets contemplated by the APA reflects the exercise of the Debtors' sound business judgment.

The Debtors have articulated good and sufficient business justification for the sale of the assets on the terms set forth in the APA pursuant to § 363(b) of the Bankruptcy Code outside of a Chapter 11 plan, and a sound business purpose exists with regard to such sale, in that, among other things:

a. The Debtors do not have the financial ability to reorganize their businesses as going concerns under Chapter 11 of the Bankruptcy Code;

b. There does not exist sufficient time to propose and seek confirmation of a Chapter 11 plan of liquidation prior to effecting the sale of the Purchased Assets as proposed without incurring substantial additional expense and risking potential substantial reduction in value of the Purchased Assets;

c. The Debtors and Ritz have at all times acted in good faith; and

d. The price to be paid for the Purchased Assets under the APA is fair, reasonable and adequate.

Approval of the sale to Ritz will enhance the ability of the Debtors to proceed with a Chapter 11 plan of liquidation for the Debtors. The Purchased Assets to be sold are subject to depreciation in value, and any delay in consummating the sales as proposed may subject the Debtors and their estates to further risk of loss through either additional expense or decline in value of the Purchased Assets. Based on the foregoing and the findings and conclusions set forth elsewhere in this Order, authorization of the sales pursuant to §§ 363 and 105 of the Bankruptcy Code is appropriate. *Committee of Equity Security Holders v. Lionel Corp.* (In re Lionel Corp.), 722 F.2d 1063 (2nd Cir. 1983).

5. It is uncontroverted (a) that the Debtors' own sole, unconditional, good and full title to the Purchased Assets identified in the APA; (b) that the Debtors have full power and authority to execute the APA and all other documents

contemplated thereby and that the sale of the Purchased Assets by the Debtors contemplated thereby has been duly and validly authorized; (c) that the Debtors have all the power and authority necessary to consummate the transaction contemplated by the APA upon entry of this Order and that the consummation of the transaction contemplated by said agreement is in compliance with the provisions hereof, will not conflict with or result in a breach of any provision of law, the terms, conditions or provisions of, any order of any court or other agency of government, the charter or bylaws of any of the Debtors, or result in the creation or imposition of any lien, charge or encumbrance of any kind whatsoever on any of the Purchased Assets; and (d) that no consents or approvals, other than those expressly provided for in the APA, are required for the Debtors to consummate the transaction contemplated by the APA.

6. The purchase price to be paid under the APA is fair, adequate, and reasonable.

7. The APA was negotiated, proposed and entered into by the parties without collusion, in good faith, and from arm's length bargaining positions. Ritz is a good faith purchaser as such term is used in § 363(m) of the Bankruptcy Code and, as such, is entitled to the protections afforded thereby. Neither the Debtors nor Ritz have engaged in any conduct that would cause or permit the APA to be avoided under § 363(n) of the Bankruptcy Code.

8. The Debtors have shown sufficient grounds for authorization of the sale of the assets pursuant to the APA free and clear of any liens, claims, charges, equities, licenses, restrictions, security interests, encumbrances or the like pursuant to § 363(f) and other applicable provisions of the Bankruptcy Code including those: (a) that purport to give any party a right or option to effect any forfeiture, modification, right of first refusal, or termination of the Debtors' or Ritz's interest in the Purchased Assets, or any similar rights and (b)

relating to taxes arising under or out of, in connection with, or in any way relating to the operation of the Debtors' business prior to the Closing Date. Consequently, the transfer of the Purchased Assets pursuant to the APA (a) shall constitute a legal, valid and effective transfer of property of the Debtors' estates to Ritz, and (b) will vest Ritz with all right, title, of the Debtors in and to the Purchased Assets free and clear of all liens, claims, charges, equities, licenses, restrictions, security interests, encumbrances or the like under § 363(f) and other applicable sections of the Bankruptcy Code and shall not subject Ritz to any liability whatsoever with respect to the operation of the Debtors' businesses prior to the Closing Date as applicable to Ritz or by reason of such transfer under the laws of the United States, any state, territory, or possession thereof, or the District of Columbia, based, in whole or in part, directly, indirectly, contingently or otherwise, on any theory of law or equity, including, without limitation, any liability or obligation (including, without limitation, under any theory of successor or transferee liability whatsoever) for any of the following items which relate in any way to either of the Debtors or their businesses:

a. all accounts and other payables, including, without limitation, any liabilities for cooperative advertising, rebates, volume discounts and any other retailer/ customer programs.

b. all warranty, product return, product liability or product recalls or similar claims or liabilities, except as provided in the APA with regard to Ritz's assumption of a limited amount of Extended Service Policy liabilities and Wolfpack Photo Club liabilities.

c. all wages or benefits or obligations of any nature whatsoever related to current or former employees or independent contractors of the Debtors, (except as provided in the APA with regard to Ritz's assump-

tion of a limited amount of accrued sick and vacation pay liabilities for the Debtors' employees who are hired by Ritz), including any claimed liabilities under any Federal or state employment related or safety laws, rules or regulations, including, without limitation, workers compensation claims, or any liabilities under any collective bargaining, pension, severance or similar agreement or plan relating to any of Debtors' current or former employees or any premiums or other amounts due or underfunding of the same.

d. all inter-company obligations among any of the Debtors or their affiliates.

e. all liabilities for any kinds of taxes, including, without limitation, income, sales, payroll, other withholding, personal property, transfer or other taxes related to Debtors or this transaction.

f. any claim, action, suit or proceeding arising from or related to the presence, generation, emissions, storage, treatment, transport or disposal of any Hazardous Material (as defined below) from to, at, in, on or under any facility owned or used by any Debtor or its affiliates and any other environmental related liabilities related in any way to either Debtor or any of their affiliates. As used herein, "Hazardous Material" means any explosives, radioactive materials, polychorinated biphenyls, petroleum and petroleum byproducts, hazardous waste as defined by Section 1004(5) of the Solid Waste Disposal Act, as amended from time to time and hazardous substances as defined by Section 101(14) of the Comprehensive Environmental Response Compensation and Liability Act of 1980, as amended, or any successor or supplementary act related thereto and all related regulations of applicable governmental entities.

g. any claim, action, suit or proceeding arising from or related to any antitrust laws.

h. any COBRA (as defined in Sections 601 through 607 of ERISA and Section 4980B of the Internal Revenue Code) liabilities or COBRA continuation coverage for employees or former employees of Debtors.

i. any claim, action, suit or proceeding arising from or related to any non-compliance with the bulk sales act of any state, the compliance of which the Debtors and purchaser hereunder are expressly relieved from. Such acts are superseded by Section 363 of the Bankruptcy Code and the supremacy clause of the United States Constitution. The notice to all creditors and opportunity to object to this sale in this Court and other aspects of this sale fairly address the concerns covered by any applicable bulk sales act.

9. Section 1146(c) of the Bankruptcy Code is applicable to the transactions proposed herein. Consequently, the Debtors shall be authorized to consummate the transactions contemplated hereby, and to convey the Purchased Assets, without the payment of any stamp or other similar tax that may be applicable to the conveyance of the Purchased Assets pursuant to the APA.

10. The Court having determined that the sale of the Debtors' assets is in the best interests of the estates, the Debtors, and creditors, that there is no viable alternative to such sale, that the proposed sale is in good faith, that the prompt and immediate sale of the assets is essential to prevent continuing loss of value to the assets and to avoid liquidation of the assets under distressed circumstances, and that the requirements of Section 363(f) of the Bankruptcy Code have been met, the objection of the Committee should be overruled.

11. The Court having found that the proposed sale does not violate Kodak's Section 363(f) rights because Kodak is only entitled to be paid the value of its lien and having further found that Kodak waived its Section 363(f) rights in the Intercreditor Agreement dated as of September 1, 1998 among First Union National Bank, Eastman Kodak Company, and Wolf Camera, Inc., the objection of Kodak should be overruled.

12. All objections to the relief requested in the Sale Motion have been resolved by stipulation of the parties, by separate Order, or by the terms and conditions of this Order or are overruled.

Relief Granted

Based upon the above findings of fact and conclusions of law, it is

ORDERED AND ADJUDGED as follows:

A. The Sale Motion is hereby GRANTED with regard to the Assets being sold to Ritz pursuant to the APA on the terms and conditions set forth herein and any and all objections that have not been resolved by stipulation of the parties, by separate Order, or by the terms and conditions of this Order are hereby OVERRULED.

B. The sale of the Purchased Assets by the Debtors pursuant to the APA and this Order, is hereby AUTHORIZED AND APPROVED. The Debtors are hereby authorized to consummate the transactions contemplated by the APA, to execute such documents and instruments as are necessary to effectuate the sale approved herein, and to convey the Purchased Assets that are the subject thereof to Ritz in accordance with the terms thereof.

C. Pursuant to the provisions of § 363(f) of the Bankruptcy Code, the Debtors are hereby authorized to transfer the Purchased Assets that are the subject of the APA to Ritz, and

such transfer shall be free and clear of any liens, claims, charges, equities, licenses, restrictions, security interests, encumbrances and the like of any person or entity including, but not limited to, any stamp, transfer, recordation, or similar taxes claimed by any entity and any lien, claim or encumbrance claimed by the Banks, the Subordinated Creditors, or any other purported secured creditor, lienholder or licensee, or any other entity. Any such party, including, without limitation, any of the kinds of parties described in conclusion of law number 8, are hereby enjoined and prevented from pursuing Ritz, or asserting any claim or charge against the Purchased Assets, with regard to any liabilities related in any way to the Debtors, including any liabilities based upon any theories of successor or transferee liability of any nature whatsoever. Upon the payment of the cash portion of the purchase price and delivery of the Promissory Note as specified in the APA and the transfer of the Purchased Assets pursuant thereto to Ritz, any lien, claim, or encumbrance claimed by the Banks, the Subordinated Creditors, or any other party in interest shall be divested from the Purchased Assets thus transferred and attached to the proceeds thereof. Any lien, claim, or encumbrance thus divested and attached to the proceeds shall be valid and effective against the proceeds to the same extent and with the same priorities, and subject to the same defenses, and objections, and rights of avoidance, that exist with regard to the Purchased Assets to which such lien, claim, or encumbrance would otherwise attach. The proceeds from the sale shall be held by counsel for the Debtors in a segregated, interest-bearing account or accounts, and, the proceeds shall be remitted to the Banks in accordance with that certain Stipulation with Respect to Distribution of Proceeds from Sale of Assets of Debtors approved by the Court by separate order pursuant to a Joint Motion of the Debtors and First Union National Bank, provided that the disbursement of such proceeds to the Banks shall be without prejudice to the rights, if any, of the

Committee or any other interested party asserting an interest in such proceeds that is claimed to be superior to the liens and other interests therein claimed by the Banks to seek disgorgement or other relief. All persons and entities holding liens, claims, or encumbrances of any kind and nature with respect to the Purchased Assets that are sold pursuant to the APA are hereby barred from asserting such liens, claims, and encumbrances of any kind and nature against Ritz, its successors or assigns, or the Purchased Assets, with any such claims or liens to be satisfied solely from the proceeds of sale received by the Debtors in accordance with their respective priority under applicable law.

D. The terms and provisions of the APA, together with the terms and provisions of this Order, shall be binding in all respects upon, and shall inure to the benefit of, the Debtors, their estates, their creditors, their shareholders, and Ritz and its successors and assigns, and any affected third parties, including, without limitation, all nondebtor parties and persons asserting a claim against or lien on the Debtors or any of the Purchased Assets, all parties present at the Sale Hearing, and any Trustee for any of the Debtors who may be subsequently appointed under any chapter of the Bankruptcy Code. This Order shall control to the extent that there is any inconsistency between its provisions and any provisions of the APA.

E. All creditors and other parties are authorized and directed to execute and deliver to Ritz such documents or instruments as may be reasonably required by the Debtors or Ritz (without cost or expense to such creditors or other parties) for the purposes of canceling or discharging of record any claim or lien on any of the Purchased Assets that are sold. All applicable governmental entities are directed to recognize the transfer of the Purchased Assets free and clear to Ritz in their public records and to accept and record filings reflecting the same.

F. This Court retains jurisdiction (i) to enforce and implement the terms and provisions of the APA, any amendments thereto, any waivers and consents thereunder, and of each of the agreements executed in connection therewith, (ii) to compel delivery of the Purchased Assets to Ritz, (iii) to compel delivery of the purchase price under the APA, (iv) to resolve any disputes arising under or related to the APA, (v) to prevent any party from pursuing Ritz for liabilities or obligations related to any of the Debtors (which Ritz may also enforce in any other court of competent jurisdiction) and to enforce the provisions of this Order for the benefit of Ritz, (vi) to interpret, implement and enforce the provisions of this Order, and (vii) to interpret, implement and enforce the provisions of other Orders entered herein in resolution of objections to the Sale Motion.

G. The APA and any related agreements, documents or other instruments may be modified, amended or supplemented by the parties thereto in accordance with the terms thereof without further order of the Court, provided that any such modification, amendment or supplement does not represent a material change to the sale transactions approved hereby.

H. Pursuant to Bankruptcy Rule 6004(g), this Order shall be effective and enforceable immediately upon entry, and the Debtors shall upon such entry be immediately authorized to proceed with the transaction as set forth in the APA.

I. The Debtors shall provide Georgia Power Company, Savannah Electric, Duke Power Company, City Public Service (San Antonio, Texas), Consolidated Edison Company of New York, Inc. and SCANA Corporation (collectively, the Utilities) with the following: (1) Advance notice, if possible, of the identity of the store locations that will no longer require utility service as a result of the sale to the Purchaser and the applicable service termination date(s); (2) Advance notice, if possible, of the store locations that will be

transferred to the Purchaser along with a contact person at the Purchaser so that the Utilities can promptly transfer utility service to the Purchaser and the applicable service transfer date(s); and (3) Access to the store locations to obtain meter readings to render final post-petition bills on accounts that will be closed and/or transferred to the Purchaser or information on the applicable landlord so that the Utilities can arrange for access through the landlord. In addition to the foregoing, the Debtors shall promptly pay, in the ordinary course of their business, all undisputed final post-petition bills issued by the Utilities by the applicable due date on the invoices, which shall be a deadline in accordance with the parties' past practices.

J. In resolution of the Objections filed by the City of Arlington, Bexar County, City of Carrollton, Dallas County, City of Denton, Harris County, City of Houston, Houston, I.S.D., Humble IS.D., Jefferson County, Katy I.S.D., Round Rock I.S.D., and Tarrant County (the "Texas Tax Authorities") and by the Treasurer of Jefferson County, Colorado (the "Jefferson County Treasurer"), a segregated account shall be established for the payment of personal property taxes due to the Texas Tax Authorities and to the Jefferson County Treasurer for pre-petition taxes. The amount to be placed into this account shall be no less than $270,000.00. The liens of the Texas Tax Authorities and the Jefferson County Treasurer will attach to these escrowed proceeds with the same force and priority which they otherwise hold against the property that is subject to the sale. Upon final assessment, presentation of a bill to the Debtors (or their successors) for the Year 2001 property taxes, and any other pre-petition taxes, and acceptance of such amounts by the Debtors (or their successors), the amounts actually assessed for the Year 2001 property taxes will be released from the escrow account and paid to the Texas Tax Authorities and to the Jefferson County Treasurer in accordance with their respective claims. If there are any amounts remaining in the escrow account

after payment of the Year 2001 ad valorem personal property taxes owed to the Texas Tax Authorities and to the Jefferson County Treasurer, such amounts shall be immediately be released to the Debtors.

K. In resolution of the Objection filed by the Tax Commissioner of DeKalb County, Georgia (the "DeKalb Tax Commissioner"), a segregated account shall be established for the payment of personal property taxes due to the DeKalb Tax Commissioner for pre-petition taxes. The amount to be placed into this account shall be no less than $19,000.00. The lien of the DeKalb Tax Commissioner will attach to these escrowed proceeds with the same force and priority which it otherwise holds against the property that is subject to the sale. Upon final assessment, presentation of a bill to the Debtors (or their successors) for the Year 2001 property taxes, and any other pre-petition taxes, and acceptance of such amounts by the Debtors (or their successors), the amounts actually assessed for the Year 2001 property taxes will be released from the escrow account and paid to the DeKalb Tax Commissioner in accordance with its claim. If there are any amounts remaining in the escrow account after payment of the Year 2001 ad valorem personal property taxes owed to the DeKalb Tax Commissioner, such amounts shall be immediately be released to the Debtors.

L. In resolution of the Limited Objection to the Sale Motion filed by Noritsu America Corporation ("Noritsu"), a segregated account shall be established for the payment of Noritsu's secured claim to the extent such claim has priority as a purchase money secured claim. The amount to be placed into this account shall be no less than $85,000.00. The lien of the Noritsu will attach to these escrowed proceeds with the same force and priority which it otherwise holds against the property that is subject to the sale. Upon final resolution of the extent and priority of Noritsu's claim, or by stipulation of the Banks and the Debtors, the amount sufficient to pay

Noritsu's secured claim as determined pursuant to Bankruptcy Code Section 506 will be released from the escrow account and paid to Noritsu in accordance with its claim. If there are any amounts remaining in the escrow account after payment of the Noritsu secured claim, such amounts shall be immediately be released to the Debtors.

M. Objections were also filed by the following tax authorities: Arlington, County, Virginia, the City and County of Denver, Colorado, and the Guilford (NC) County Tax Collector. In resolution of such claims, a segregated account shall be established for the payment of personal property taxes due to these taxing authorities for pre-petition taxes. The amount to be placed into this account shall be no less than $75,000.00. The liens of the taxing authorities will attach to these escrowed proceeds with the same force and priority which such liens otherwise hold against the property that is subject to the sale.

N. Because of the financial exigencies and the need to quickly consummate the Proposed Sale, Debtors, in the Sale Motion showed that they had insufficient time to comply with the notice requirements under section 2102 of title 29 of the United States Code, 29 U.S.C. §§ 2101-2109 (as amended and supplemented, the "WARN Act"). Therefore, pursuant to Section 105 of the Bankruptcy Code, the time periods pursuant to section 2102 are hereby reduced, and the Debtors are authorized to send any notices required by the WARN Act within five days of the entry of this Order.

IT IS SO ORDERED this 21st day of September, 2001.

/s/ C. Ray Mullins
C. RAY MULLINS
UNITED STATES BANKRUPTCY JUDGE

Prepared and Submitted By:

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Number of labels for parties shown above: 11

Pursuant to Fed. R. Bank. P. 9022 and 7005, I certify that on the date stated below, I served a copy of the foregoing document(s) on each of the persons and entities named in the foregoing list either by United States Mail at the respective addresses shown or, if an attorney subscribes to a mail pick-up box in the Clerk's Office, by placing a copy in such attorney's mail pick-up box.

Date: 4-21-01 W. Yvonne Evans, Clerk of Court

By: /s/ Charles Slater
CHARLES SLATER (SLATERC)

APPENDIX I

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

Chapter 11

Jointly Administered

Case Nos. 01-83470, 01-83472, 01-83474 and 01-83475

Judge C. Ray Mullins

In re: WOLF CAMERA, INC. a Georgia corporation,
Tax ID No. 58-1210910, and affiliates,
Debtors.

FINAL ORDER (I) AUTHORIZING DEBTORS TO OBTAIN POSTPETITION FINANCING PURSUANT TO 11 U.S.C. §§105, 361, 362, 363, 364(c)(1), 364(c)(2), 364(c)(3) and 364(d)(1), (II) UTILIZE CASH COLLATERAL PURSUANT TO 11 U.S.C. §363, AND (III) GRANTING ADEQUATE PROTECTION TO PREPETITION SECURED PARTIES

Upon the motion (the "Motion"), dated June 21, 2001, of Wolf Camera, Inc. ("Wolf") and its affiliated debtors, each as a Debtor and Debtor-in-Possession (collectively, the "Borrowers" or the "Debtors"),

(i) seeking this Court's authorization, pursuant to Sections 105, 361, 362, 363 364(c)(1), 364(c)(2), 364(c)(3) and 364(d)(1) of the United States Bankruptcy Code, 11 U.S.C. §§101, et seq. (the "Bankruptcy Code" or "Code"), and Rules 2002, 4001 and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), for the Borrowers to obtain Postpetition financing (the "Postpetition Financing") up to the principal amount of $10 million from First Union

National Bank ("First Union" or the "Postpetition Agent"), and a syndicate of financial institutions (together with First Union, the "Postpetition Lenders"), with First Union acting as Postpetition Agent for itself and the Postpetition Lenders,

(w) having priority over any and all administrative expenses of the kind specified in Sections 503(b) and 507(b) of the Code pursuant to Section 364(c)(1) of the Code, subject to the Carve-Out (as defined below),

(x) to be secured, subject to the Carve-Out, pursuant to Section 364(c)(2) of the Code by perfected first priority security interests in and liens upon all unencumbered pre- and postpetition property of the Debtors (excluding all of the Debtors' rights in and to claims and causes of action under Sections 502(d), 544, 545, 547, 548, 549, 550 or 551 of, and any other avoidance actions under, the Code, provided, however, that, notwithstanding such exclusion, the proceeds of such claims and causes of action shall be available for the repayment of the obligations under the DIP Credit Agreement),

(y) to be secured, subject to the Carve-Out, pursuant to Section 364(c)(3) of the Code by perfected security interests in and liens upon all pre- and postpetition property of the Debtors (other than property that is subject to the existing liens that secure obligations under the Existing Agreements referred to in clause (z) below, which liens referred to in clause (z) below shall be primed pursuant to Section 364(d)(1) of the Code by the liens to be granted to the Postpetition Agent as described in such clause) that is subject to valid and perfected liens in existence on the date of the filing of the petitions herein (the "Petition Date"), or to valid liens in existence on the Petition Date that are perfected subsequent to the Petition Date as permitted by Sections 546(b) and 362(b)(13) of the Bankruptcy Code, junior to such valid and perfected liens, and

(z) to be secured, subject to the Carve-Out, pursuant to Section 364(d)(1) of the Bankruptcy Code by perfected first priority senior priming security interests in and liens upon all pre- and postpetition property of the Debtors (including, without limitation, accounts receivable, contracts, documents, equipment, general intangibles, instruments, inventory, interests in leaseholds, real property and the proceeds of all of the foregoing) that is subject to (i) the existing liens presently securing the Debtors' indebtedness owing to certain lenders under or in connection with that certain Credit Agreement dated as of September 1, 1998 (as heretofore amended, the "Existing Credit Agreement"; and collectively with the other documentation executed in connection therewith, the "Existing Agreements") among the Borrowers, the secured lenders from time to time party thereto (collectively, the "Prepetition Secured Lenders") and First Union, as administrative agent (in such capacity, the "Prepetition Agent"), including issued but undrawn letters of credit issued pursuant to the Existing Credit Agreement, and (ii) the junior subordinated liens presently securing the Debtor's indebtedness to Eastman Kodak Company ("Kodak") pursuant to that certain Second Amended and Restated Loan and Purchase Agreement, dated as of March 14, 2000, between Kodak and

Wolf (as heretofore amended and collectively with the other documentation executed in connection therewith, the "Kodak Loan Agreements"), senior in all respects to such existing liens (the "Primed Liens") (but not to liens, if any, to which such existing liens are subject on the Petition Date) and senior in all respects to any liens granted on or after the Petition Date to provide adequate protection to the Prepetition Secured Lenders and to Kodak (all of the foregoing property specified in clauses (x), (y) and (z) above being hereinafter collectively referred to in this Order as the "Collateral"); and for the provision of adequate protection to the Prepetition Secured Lenders and Kodak whose liens and security interests are being primed by the Postpetition Financing,

(ii) seeking this Court's authorization, pursuant to Sections 361, 362 and 363 of the Code, for the use of cash collateral (as such term is defined in the Code) and other collateral in which the Prepetition Secured Lenders and Kodak have an interest and for the provision of adequate protection to the Prepetition Secured Lenders and Kodak with respect to such use of cash collateral and other collateral,

(iv) requesting, pursuant to Bankruptcy Rule 4001, that an interim hearing (the "Interim Hearing") on the Motion be held for this Court to consider entry of an order (the "Interim Order") (x) authorizing the Borrowers, on an interim basis, to borrow or obtain letters of credit under the Postpetition Financing from the Postpetition Lenders up to an aggregate of $10 million, and (y) authorizing the use by the Debtors of cash collateral and (z) granting the adequate protection hereinafter described, and

(v) requesting that a final hearing (the "Final Hearing") thereafter be held for this Court to consider entry of an order authorizing the Postpetition Financing on a final basis as set forth in the Motion and the loan documentation filed with this Court; and pursuant to Bankruptcy Rules 4001(b) and 4001(c)(1), due and sufficient notice under the circumstances of the Motion and the Final Hearing having been given by the Debtors to the twenty largest unsecured creditors of the Debtors, the Prepetition Agent, Kodak, the United States Trustee for the Northern District of Georgia and to any other party that has filed a request for notices with this Court, the Interim Hearing having been held on June 22, 2001, and this Court having entered an Interim Order dated June 22, 2001 (i) authorizing the Borrowers, on an interim basis, to borrow up to $10 million under the Postpetition Financing from the Postpetition Lenders, (ii) authorizing the use by the Debtors of cash collateral and (iii) granting the adequate protection hereinafter described, upon all the pleadings filed with this Court, and upon the record made by the Debtors at the

Interim Hearing and the Final Hearing held on July 24, 2001, after due deliberation and consideration and sufficient cause appearing therefor;

IT IS FOUND, DETERMINED, ORDERED AND ADJUDGED, that:

1. This Court has core jurisdiction over these proceedings and the parties and property affected hereby pursuant to 28 U.S.C. §§157(b) and 1334.

2. Without prejudice to the rights of any other party (but subject to the limitations thereon described below in paragraph 24), the Debtors admit that, in accordance with the terms of the Existing Agreements, they are truly and justly indebted to the Prepetition Secured Lenders, without defense, counterclaim or offset of any kind, and that as of the Petition Date the Borrowers were liable to the Prepetition Secured Lenders in the aggregate principal amount of approximately $77,660,000 in respect of loans made and letters of credit issued by the Prepetition Secured Lenders pursuant to the Existing Credit Agreement, plus interest thereon and fees and expenses incurred in connection therewith as provided in the Existing Agreements (collectively, the "Prepetition Debt"). The Debtors acknowledge and agree that no portion of the Prepetition Debt is subject to avoidance or subordination pursuant to the Bankruptcy Code or applicable non-bankruptcy law.

3. Without prejudice to the rights of any other party (but subject to the limitations thereon described below in paragraph 24), the Debtors further admit that the liens and security interests granted to the Prepetition Agent for the ratable benefit of itself and the Prepetition Secured Lenders pursuant to the Existing Agreements and all mortgages, deeds of trust and other security documents executed by the Debtors for the benefit of the Prepetition Secured Lenders in connection with the Existing Agreements, are valid, binding,

perfected, enforceable, first-priority liens and security interests in the personal and real property described in the Existing Agreements and in such mortgages, deeds of trust and other security documents (the "Prepetition Collateral"), junior and subject to (i) the liens and security interests granted to the Postpetition Agent pursuant to this Order and the DIP Credit Agreement, and (ii) the liens permitted under the Existing Agreements to the extent such permitted liens are senior to the liens of the Prepetition Agent on the Prepetition Collateral. The Debtors acknowledge and agree that the Prepetition Agent's liens and security interests in the Prepetition Collateral are not subject to avoidance or subordination under the Bankruptcy Code or applicable non-bankruptcy law.

4. As of the Petition Date, funds on deposit at First Union and various of the other Prepetition Secured Lenders were subject to rights of set-off under the Existing Credit Agreement and applicable law and, by virtue of such set-off rights, are subject to a lien in favor of such Prepetition Secured Lenders pursuant to Sections 506(a) and 553 of the Bankruptcy Code. Pursuant to the Existing Agreements, such Prepetition Secured Lenders are obligated to share the benefit of such lien with the other Prepetition Secured Lenders party to such Existing Agreements based upon their respective pro rata shares of the obligations under such Existing Agreements. Accordingly, any proceeds of the Prepetition Collateral (including cash on deposit at First Union or any of the Prepetition Secured Lenders as of the Petition Date) are cash collateral of the Prepetition Secured Lenders within the meaning of Section 363(a) of the Bankruptcy Code (the "Cash Collateral"). The Prepetition Secured Lenders are entitled, pursuant to Sections 361, 363(e) and 364(d)(1) of the Bankruptcy Code, to adequate protection of their interest in the Prepetition Collateral, including the Cash Collateral, for any diminution in value of the Prepetition Collateral, including, without limitation, resulting from the use of the

Cash Collateral, the incurrence by the Debtors of Postpetition Financing secured by priming liens on the Prepetition Collateral, or the use, sale or lease of the Prepetition Collateral and the imposition of the automatic stay.

5. Kodak is entitled, pursuant to Section 361, 363(e) and 364(d)(1) of the Bankruptcy Code, to adequate protection of its junior, subordinated interest in the Prepetition Collateral for any diminution in value of the Prepetition Collateral, including, without limitation, resulting from the incurrence by the Debtors of Postpetition Financing secured by priming liens on the Prepetition Collateral, or the use, sale or lease of the Prepetition Collateral and the imposition of the automatic stay.

6. The Borrowers have an immediate need to obtain financing in order to permit, among other things, the orderly continuation of the operation of their business, to maintain business relationships with vendors and suppliers, and to satisfy other working capital needs. The Borrowers are unable to obtain adequate unsecured credit allowable under Section 503(b)(1) of the Bankruptcy Code as an administrative expense. A facility in the amount provided by the Postpetition Financing is unavailable to the Borrowers without the Debtors granting to the Postpetition Agent and the Postpetition Lenders, subject to the Carve-Out, (i) pursuant to Section 364(c)(1) of the Bankruptcy Code, allowed claims, with respect to all indebtedness and obligations of the Debtors under and in connection with the DIP Credit Agreement (and with respect to all indebtedness and obligations in respect of overdrafts and related liabilities referred to in Section 6.03(iv) of the DIP Credit Agreement), having priority over any and all administrative expenses of the kind specified in Sections 503(b) and 507(b) of the Bankruptcy Code, (ii) pursuant to Section 364(c)(2) of the Bankruptcy Code, security for such obligations by the granting of perfected first priority senior security interests in

and liens upon all unencumbered pre-and postpetition property of the Debtors (excluding all of the Debtors' rights in and to claims and causes of action under Sections 502(d), 544, 545, 547, 548, 549, 550 or 551 of, and any other avoidance actions under, the Bankruptcy Code, with the proceeds of such claims and causes of action being available for the repayment of the obligations under the DIP Credit Agreement, subject to the Trustee Carve-Out as set forth in paragraph 12), (iii) pursuant to Section 364(c)(3) of the Bankruptcy Code, security for such obligations by the granting of perfected junior priority security interests and liens upon all pre- and postpetition property of the Debtors (but not including the property that is described in clause (iv) below, as to which the security interests and liens in favor of the Postpetition Agent shall be as described in such clause), that is subject to valid and perfected liens in existence on the Petition Date and to valid liens in existence on the Petition Date that are perfected subsequent to the Petition Date as permitted by Sections 546(b) and 362(b)(18) of the Bankruptcy Code, and (iv) pursuant to Section 364(d)(1) of the Code, security for such obligations by the granting of first priority senior priming security interests in and liens upon all of the Prepetition Collateral, senior in all respects to existing liens and to any liens granted on or after the Petition Date herein to provide adequate protection in respect of such liens or otherwise. The ability of the Debtors to obtain sufficient working capital and liquidity through the use of cash collateral, incurrence of new indebtedness for borrowed money and other financial accommodations is vital to the Debtors. The preservation and maintenance of the going concern value of the Debtors is integral to a successful reorganization of the Debtors pursuant to the provisions of Chapter 11 of the Bankruptcy Code.

7. The terms of the Postpetition Financing are fair and reasonable, reflect the Debtors' exercise of prudent business judgment consistent with their fiduciary duty and are

supported by reasonably equivalent value and fair consideration. The terms of the Postpetition Financing have been negotiated in good faith and at arm's-length among the Debtors, the Postpetition Agent, the Postpetition Lenders, the Prepetition Agent and the Prepetition Secured Lenders and any credit extended and loans made to the Borrowers by the Postpetition Lenders pursuant to the Revolving Credit Agreement dated as of June 22, 2001 (the "DIP Credit Agreement"), and any credit extended in respect of overdrafts or related liabilities referred to in Section 6.03(iv) of the DIP Credit Agreement, shall be deemed to have been extended by the Postpetition Lenders or the Prepetition Lenders, as the case may be, in good faith, as that term is used in Section 364(e) of the Bankruptcy Code.

8. The Documents (as defined below) and the Postpetition Financing are hereby approved as set forth in this Order and the Borrowers are immediately authorized to borrow pursuant to the DIP Credit Agreement up to an aggregate of $10 million, which shall be used for the purpose of providing working capital for the Borrowers and other general corporate purposes of the Borrowers in accordance with the DIP Credit Agreement and the Budget (as defined in the DIP Credit Agreement). In addition, the Debtors are immediately authorized to incur overdrafts and related liabilities arising from treasury, depository and cash management services or in connection with any automated clearing house fund transfers provided to or for the benefit of the Debtors by First Union or any other Prepetition Secured Lender or *any of* their respective affiliates (in addition to the amount of borrowings pursuant to the DIP Credit Agreement), provided, however, that nothing herein shall obligate First Union or any of the Prepetition Secured Lenders to honor such overdrafts or related liabilities. Notwithstanding anything herein to the contrary, no borrowings, letters of credit, Cash Collateral, Collateral, the Carve-Out or the Trustee Carve-Out may be used to object, contest or raise any defense to, the validity,

perfection, priority, extent or enforceability of the Prepetition Debt or the Postpetition Financing or the liens securing the Prepetition Debt or the Postpetition Financing, or to assert any claims or causes of action against the Prepetition Agent or the Prepetition Secured Lenders or the Postpetition Agent or the Postpetition Lenders.

9. The Debtors are expressly authorized and empowered to execute and deliver, among other documents, the DIP Credit Agreement and the Security and Pledge Agreement (as defined in the DIP Credit Agreement) in substantially the forms heretofore filed with this Court (collectively, the "Documents"). The Debtors are hereby authorized to perform and do all acts that may be required in connection with the Documents. Upon execution and delivery of the Documents, the Documents shall constitute valid and binding obligations of the Debtors, enforceable against the Debtors in accordance with their terms.

10. For all of the Debtors' obligations and indebtedness arising under and in connection with the Postpetition Financing and the Documents (and in respect of overdrafts and related liabilities referred to in Section 6.03(iv) of the DIP Credit Agreement), the Postpetition Agent and the Postpetition Lenders are granted pursuant to Section 364(c)(1) of the Bankruptcy Code an allowed claim which allowed claim shall be payable from and have recourse to, in addition to the property of the Debtors that is made subject to security interests and liens in favor of the Postpetition Agent on behalf of the Postpetition Lenders as set forth in paragraph 12 of this Order, any unencumbered pre-and postpetition property of the Debtors, including, without limitation, any amounts that are recovered or otherwise received by the Debtors in respect of claims under Sections 502(d), 544, 545, 547, 548, 549, 550 or 551 of, or any other avoidance actions under, the Bankruptcy Code having priority over any and all administrative expenses of the kind specified in Sections

503(b) and 507(b) of the Bankruptcy Code, subject only to (x) in the event of the occurrence and during the continuance of an Event of Default (as defined in the DIP Credit Agreement) or an event that would constitute an Event of Default with the giving of notice or lapse of time or both, the payment of accrued and unpaid and future fees and disbursements theretofore or thereafter incurred by the Debtors' professionals, by professionals for any statutory committee (each, a "Committee") appointed in the Debtors' Chapter 11 cases (the "Cases") and by any Chapter 7 or Chapter 11 trustee or examiner hereafter appointed or elected for the estates of the Debtors and any professional for any such trustee or examiner, allowed by an order of the Court in an aggregate amount not in excess of $1,300,000 and (y) the payment of fees pursuant to 28 U.S.C. §1930 and to the Clerk of the Court (collectively, the "Carve-Out").

11. So long as an Event of Default or an event which with the giving of notice or lapse of time or both would constitute an Event of Default shall not have occurred, (i) the Debtors shall be permitted to pay administrative expenses allowed and payable under Sections 330 and 331 of the Bankruptcy Code, as the same may be due and payable, and (ii) such payments shall not be applied against the Carve-Out. Except to the extent of the Carve-Out and the Trustee Carve-Out (including the fees and expenses of professionals for any trustee or examiner), no expenses of administration of the Cases or any future proceeding or case which may result therefrom, including liquidation in bankruptcy or other proceedings under the Code, shall be charged pursuant to Section 506(c) of the Code or otherwise against (a) the Collateral without the prior written consent of the Postpetition Agent (with respect to the Postpetition Financing) and no such consent shall be implied from any other action, inaction, or acquiescence by the Postpetition Agent or (b) the Prepetition Collateral by the Debtors without the prior written consent of the Prepetition Agent (which shall obtain the consent of the Required

Lenders (as defined in the Existing Credit Agreement)), and no such consent shall be implied from any action, inaction, or acquiescence by the Prepetition Agent or the Prepetition Secured Lenders.

12. As security for all of the Debtors' obligations and indebtedness arising under the Postpetition Financing and the Documents (and in respect of overdrafts and related liabilities referred to in Section 6.03(iv) of the DIP Credit Agreement), the Postpetition Agent on behalf of the Postpetition Lenders is hereby granted (effective upon the date of this Order and without the necessity of the execution by the Debtors of mortgages, security agreements or otherwise), (x) pursuant to Section 364(c)(2) of the Bankruptcy Code, perfected first priority senior security interests in and liens upon all unencumbered pre- and postpetition property of the Debtors (excluding all of the Debtors' rights in and to claims and causes of action under Sections 502(d), 544, 545, 547, 548, 549, 550 or 551 of, and any other avoidance actions under, the Bankruptcy Code, it being expressly held that, notwithstanding such exclusion from the liens authorized hereby, the proceeds or other amounts received by the Debtors in respect of such claims and causes of action may be applied to, among other obligations, the payment of the allowed claims of the Postpetition Agent and the Postpetition Lenders referred to in paragraph 10 of this Order, subject to the fees and expenses of any Chapter 7 trustee appointed in the Cases, including the fees and expenses of professionals retained by the Chapter 7 trustee (the "Trustee Carve-Out"); (y) pursuant to Section 364(c)(3) of the Bankruptcy Code, perfected junior priority security interests in and liens upon all pre-and postpetition property of the Debtors (other than property that is subject to the existing liens that secure obligations under the Existing Agreements referred to in clause (z) below which shall be primed by the liens to be granted to the Postpetition Agent as described in such clause), that is subject to valid and perfected liens in existence on the

Petition Date or to valid liens in existence on the Petition Date that are perfected subsequent to the Petition Date as permitted by Sections 546(b) or 362(b)(18) of the Bankruptcy Code; and (z) pursuant to Section 364(d)(1) of the Bankruptcy Code, perfected first priority senior priming security interests in and liens upon all pre- and postpetition property of the Debtors (including, without limitation, accounts receivable, contracts, documents, equipment, general intangibles, instruments, inventory, interests in leaseholds, real property and the proceeds of all of the foregoing), that is subject to the existing liens presently securing the Prepetition Debt and the Debtors' obligations to Kodak under the Kodak Loan Agreements, such security interests and liens being senior in all respects to any and all present and future liens, if any, of the Prepetition Secured Lenders and Kodak referred to in this clause (z) (but not to liens, if any, to which the liens of the Prepetition Secured Lenders are subject on the Petition Date or become subject subsequent to the Petition Date as permitted by Sections 546(b) or 362(b)(18) of the Bankruptcy Code). The security interests and liens granted to the Postpetition Agent on behalf of the Postpetition Lenders hereunder shall not be subordinated to or made pari passu with any other lien or security interest under Section 364(d) of the Bankruptcy Code or otherwise.

13. Payment of the Prepetition Debt, the Adequate Protection Obligations and the Kodak Adequate Protection Obligations (each as defined below) shall be subordinated to the full, final and indefeasible payment in cash of all amounts owing in respect of the Postpetition Financing. Without limiting the generality of the foregoing, unless and until all amounts owing in respect of the Postpetition Financing are indefeasibly paid in full in cash and the DIP Credit Agreement and all commitments therein are terminated, and except as otherwise authorized by an order of the Court, the holders of Prepetition Debt or the Adequate Protection

Obligations or the Kodak Adequate Protection Obligations shall not exercise any enforcement rights against, or with respect to, the Collateral or any other rights or remedies that may interfere with or otherwise restrict the rights and remedies of the Postpetition Agent and the Postpetition Lenders under the Documents or otherwise with respect to the DIP Credit Agreement.

14. The Debtors are hereby authorized to use all Cash Collateral of the Prepetition Secured Lenders and Kodak consistent with the Order Authorizing Debtors In Possession to Maintain Their Existing Cash Management System, Bank Accounts and Business Forms (the "Cash Management Order") and subject to such restrictions or limitations on such use as may be in effect from time to time under the DIP Credit Agreement. As adequate protection for any diminution in value of the Prepetition Secured Lenders' interests in the Prepetition Collateral resulting from (x) the use by the Debtors of Cash Collateral and any other Prepetition Collateral, (y) the priming of the Prepetition Agent's and the other Prepetition Secured Lenders' security interests and liens in the Prepetition Collateral by the Postpetition Agent and the Postpetition Lenders pursuant to the Postpetition Financing and this Order and (z) the imposition of the automatic stay pursuant to Section 362 of the Bankruptcy Code, the Prepetition Agent and the Prepetition Secured Lenders (A) are granted (effective upon the Petition Date and without the necessity of the execution by the Debtors of mortgages, security agreements, pledge agreements, financing statements or other agreements) a security interest and lien upon all of the Collateral (i) immediately junior only to the security interests and liens granted to the Postpetition Agent for the benefit of the Postpetition Lenders in this Order and pursuant to the Documents in respect of the Postpetition Financing and (ii) subject to the Carve-Out, (B) are granted a superpriority allowed claim pursuant to Section 507(b) of the Bankruptcy Code, (i) immediately junior to the claims under Section

364(c)(1) of the Bankruptcy Code held by the Postpetition Agent and the Postpetition Lenders as set forth in paragraph 10, (ii) payable from and have recourse to, in addition to the property of the Debtors that is made subject to the security interests and liens of the Postpetition Agent on behalf of the Postpetition Lenders as set forth in paragraph 12 of this Order, any unencumbered pre- and postpetition property of the Debtors, including, without limitation, any amounts that are recovered or otherwise received by the Debtors in respect of claims under Sections 502(d), 544, 545, 547, 548, 549, 550 or 551 of, or any other avoidance actions under, the Bankruptcy Code, subject to the Trustee Carve-Out, and (iii) subject to the Carve-Out) and (C) shall receive the payment on a current basis of the reasonable fees and expenses (including, but not limited to, the reasonable fees and disbursements of counsel and internal and third-party consultants, including financial consultants, and auditors) incurred by the Prepetition Agent under the Existing Agreements (including any unpaid prepetition fees and expenses) and the continuation of the payment to the Prepetition Agent under the Existing Agreements on a current basis of the administration fees that are provided for thereunder, subject to re-characterization as provided for in paragraph 24 hereafter. As used in this Order, the term "Adequate Protection Obligations" shall mean all of the obligations of the Debtors to the Prepetition Agent and the Prepetition Lenders set forth in this paragraph.

15. Under the current circumstances, the Court finds that the adequate protection provided herein is reasonable and sufficient to protect the interests of the Prepetition Secured Lenders notwithstanding any other provision hereof, subject to the rights of the Prepetition Agent or the Prepetition Secured Lenders to request further or different adequate protection (including, without limitation, the payment of current interest on the Prepetition Debt at any applicable rate of interest, or on any other basis, provided for in the Existing

Agreements). The Prepetition Lenders expressly reserve the right to continue to accrue interest on the Prepetition Debt at the non-default contract rate for Base Rate Loans (as defined in the Existing Credit Agreement) (notwithstanding any LIBOR pricing options) provided for in the Existing Agreements.

16. As adequate protection for any diminution in value of Kodak's interest in the Prepetition Collateral resulting from (x) the priming of Kodak's junior subordinated security interests and liens in the Prepetition Collateral by the Postpetition Agent and the Postpetition Lenders pursuant to the Postpetition financing and this Order and (y) the imposition of the automatic stay pursuant to Section 362 of the Bankruptcy Code, Kodak is granted (A) (effective upon the Petition Date and without the necessity of the execution by the Debtors of mortgages, security agreements, pledge agreements, financing statements or other agreements) a security interest and lien upon all of the Collateral (i) junior to (aa) the security interests and liens granted to the Postpetition Agent for the benefit of the Postpetition Agent for the benefit of the Postpetition Lenders in this Order and pursuant to the Documents in respect of the Postpetition Financing, and (bb) the security interests and liens granted to the Prepetition Agent for the benefit of the Prepetition Liens in this Order in respect of the Adequate Protection Obligations, and (ii) subject to the Carve-Out, and (B) a super-priority allowed claim pursuant to Section 507(b) of the Bankruptcy Code, junior to (aa) the claims under Section 364(c)(1) of the Bankruptcy Code held by the Postpetition Agent and the Postpetition Lenders as set forth in paragraph 10, (bb) the claims under Section 507(b) of the Bankruptcy Code in respect of the Adequate Protection Obligations, payable from and have recourse to, in addition to the property of the Debtors that is made subject to the security interests and liens of the Postpetition Agent on behalf of the Postpetition Lenders as set forth in paragraph 12 of this

Order, any unencumbered pre- and postpetition property of the Debtors, including, without limitation, any amounts that are recovered or otherwise received by the Debtors in respect of claims under Sections 502(d), 544, 545, 547, 548, 549, 550 or 551 of, or any other avoidance actions under, the Bankruptcy Code subject to the Trustee Carve-Out, and (cc) subject to the Carve-Out. As used in this Order, the term "Kodak Adequate Protection Obligations" shall mean all of the obligations of Debtors to Kodak set forth in this paragraph. Under the circumstances, the Court finds that the adequate protection provided herein is reasonable and sufficient to protect the interests of Kodak, subject to Kodak's rights (if any) to request further or different adequate protection upon a showing of changed circumstances but subject to the provisions of that certain Subordination Agreement, dated as of September 1, 1998, among Wolf, Kodak and the Prepetition Agent.

17. No other claim having a priority superior to or pari passu with those granted by this Order (i) to the Postpetition Agent and the Postpetition Lenders, (ii) to the Prepetition Agent and the Prepetition Secured Lenders and (iii) Kodak, respectively, shall be granted while any portion of the Postpetition Financing (or refinancing thereof) or the commitment thereunder remains outstanding or any Adequate Protection Obligations or Kodak Adequate Protection Obligations remain outstanding.

18. The Postpetition Agent, the Postpetition Lenders, the Prepetition Agent, the Prepetition Secured Lenders and Kodak shall not be required to file or record financing statements, mortgages, notices of lien or similar instruments in any jurisdiction or take any other action in order to validate and perfect the security interests and liens granted to them pursuant to this Order. If the Postpetition Agent on behalf of the Postpetition Lenders or the Prepetition Agent on behalf of the Prepetition Secured Lenders or Kodak shall, each in its

sole discretion, choose to file such financing statements, mortgages, notices of lien or similar instruments or otherwise confirm perfection of such security interests and liens, all such documents shall be deemed to have been filed or recorded at the time and on the date of entry of this Order. The Prepetition Agent and Kodak shall not file such financing statements, mortgages, notices of lien or similar instruments, or otherwise confirm perfection of such security interests and liens, unless the Postpetition Agent on behalf of the Postpetition Lenders shall theretofore have done so.

19. Upon the request of the Postpetition Agent, the Prepetition Secured Lenders and Kodak are authorized to make, execute and deliver such instruments (in each case without representation or warranty of any kind) to enable the Postpetition Agent to further perfect, preserve and enforce the security interests and liens granted to the Postpetition Agent for the benefit of the Postpetition Lenders by the Documents and this Order.

20. The Prepetition Secured Lenders and Kodak are directed to promptly turn over to the Debtors, or otherwise make available to the Debtors in a manner consistent with the Cash Management Order, all Cash Collateral received or held by them, subject to any limitations then effective under the DIP Credit Agreement with respect to the Debtors' use of Cash Collateral. The Prepetition Secured Lenders and Kodak are directed to, so long as there are any borrowings, or the Postpetition Lenders have any Commitment (as defined in the DIP Credit Agreement) under the DIP Credit Agreement, take no action to foreclose upon the liens granted to (i) the Prepetition Secured Lenders pursuant to the Existing Agreements and this Order or (ii) Kodak pursuant to the Kodak Loan Agreements and this Order, or otherwise exercise remedies against the Collateral, in each case to the extent not authorized by an order of this Court.

21. The Debtors are authorized and directed to do and perform all acts, to make, execute and deliver all instruments and documents (including, without limitation, the execution of security agreements, mortgages and financing statements), and to pay fees, which may be reasonably required or necessary for the Debtors' performance under the Postpetition Financing, including, without limitation: (i) the execution of the Documents, (ii) the execution of an amendment to the DIP Credit Agreement for the purpose of, among other things, the incorporation into the DIP Credit Agreement of the provisions referred to in Section 5.11 thereof, and (iii) the non-refundable payment to First Union or the Postpetition Lenders, as the case may be, of the Fees referred to in the DIP Credit Agreement, Commitment Fees and reasonable costs and expenses (as to which invoices are furnished) as may be due from time to time including, without limitation, reasonable attorneys' fees and disbursements (as to which invoices are furnished) as provided in the Documents, all as such terms are defined in the Documents.

22. Subject only to the provisions of the DIP Credit Agreement, the automatic stay provisions of Section 362 of the Bankruptcy Code are vacated and modified to the extent necessary so as to permit the Postpetition Agent and the Postpetition Lenders to exercise, upon the occurrence of an Event of Default and the giving of the 5 business days' written notice provided for in the DIP Credit Agreement, all rights and remedies provided for in the Documents (including, without limitation, the right to setoff monies of the Debtors in accounts maintained with the Postpetition Agent or any Postpetition Lender). No party shall seek relief under the Bankruptcy Code, including, without limitation, Section 105 of the Bankruptcy Code, to the extent that any such relief would in any way restrict or impair the rights of the Postpetition Agent and the Postpetition Lenders set forth in this Order and in the Documents, provided that the foregoing shall not preclude the Debtors from contesting

whether an Event of Default (as defined in the DIP Credit Agreement) has occurred and is continuing under the DIP Credit Agreement. Except as otherwise provided in Article VII of the DIP Credit Agreement, the Debtors' right to use Cash Collateral shall terminate automatically on the Termination Date (as defined in the DIP Credit Agreement).

23. The Documents and the provisions of this Order shall be binding upon the Postpetition Agent, the Postpetition Lenders, the Prepetition Agent, the Prepetition Secured Lenders, Kodak and the Debtors and their respective successors and assigns (including any Chapter 7 or Chapter 11 trustee hereinafter appointed or elected for the estates of the Debtors) and inure to the benefit of the Postpetition Agent, the Postpetition Lenders, the Pre-Petition Agent, the Prepetition Secured Lenders, Kodak and the Debtors and (except with respect to any trustee hereinafter appointed or elected for the estates of the Debtors) their respective successors and assigns.

24. The findings and admissions contained in this Order, including, without limitation, the findings and admissions contained in paragraphs 2 and 3 of this Order shall be binding upon all parties in interest, including any Committee, unless (i) a party in interest has properly filed an adversary proceeding or contested matter (subject to the limitation contained in paragraph 7) (x) challenging the validity, enforceability, characterization, priority or extent of the Prepetition Debt or the Prepetition Agent's or the Prepetition Secured Lenders' liens on the Prepetition Collateral by no later than the earlier of (i) the date that is six months from the date of entry of this Order and (ii) the entry of an order approving a disclosure statement with respect to a plan of reorganization in the Cases, or (y) otherwise asserting any claims or causes of action against the Prepetition Agent or the Prepetition Secured Lenders on behalf of the Debtors' estates by no later than the entry of an order approving a disclosure

statement with respect to a plan of reorganization in the Cases, and (ii) the Court rules in favor of the plaintiff in any such timely and properly filed adversary proceeding or contested matter. If no such adversary proceeding or contested matter is properly filed as of such dates, (a) the Prepetition Debt and related obligations of the Debtors (the "Prepetition Obligations") shall constitute allowed claims, not subject to subordination and otherwise unavoidable, for all purposes of the Debtors' Chapter 11 Cases and any subsequent Chapter 7 case, (b) the Prepetition Agent's and the Prepetition Secured Lenders' liens on the Prepetition Collateral shall be deemed to have been, as of the Petition Date, legal, valid, binding, perfected, not subject to recharacterization, subordination and otherwise unavoidable and (c) the Prepetition Obligations, the Prepetition Agent's and the Prepetition Secured Lenders' liens on the Prepetition Collateral and the Prepetition Agent and the Prepetition Secured Lenders shall not be subject to any other or further challenge by any party in interest seeking to exercise the rights of the Debtors' estates, including, without limitation, any successor thereto. If any such adversary proceeding or contested matter is properly filed as of such date, the findings and admissions contained in paragraphs 2 and 3 shall nonetheless remain binding and preclusive (as provided in the second sentence of this paragraph) except to the extent that such findings and admissions were expressly challenged in such adversary proceeding or contested matter.

25. Unless all obligations and indebtedness owing to the Postpetition Agent and the Postpetition Lenders under the DIP Credit Agreement theretofore have been paid in full, the Debtors shall not seek, and it shall constitute an Event of Default if the Debtors seek, or if there is entered, an order dismissing any of the Cases. If an order dismissing any of the Cases under Section 1112 of the Bankruptcy Code or otherwise is at any time entered, such order shall provide (in accordance with Sections 105 and 349 of the Bankruptcy

Code) that (x) the superpriority claims, priming liens and security interests, replacement security interests and other protections afforded or granted to the Postpetition Agent, the Postpetition Lenders, the Prepetition Agent, the Prepetition Secured Lenders and Kodak, as the case may be, pursuant to this Order shall continue in full force and effect and shall maintain their priorities as provided in this Order until all obligations in respect thereof shall have been paid and satisfied in full (and that such superpriority claims, priming liens and replacement liens and other protections, shall, notwithstanding such dismissal, remain binding on all parties in interest) and (y) this Court shall retain jurisdiction, notwithstanding such dismissal, for the limited purpose of enforcing and validating the claims, liens and the priority of the liens and security interests referred to in (x) above. If any or all of the provisions of this Order are hereafter reversed, modified, vacated or stayed, such reversal, stay, modification or vacation shall not affect (i) the validity of any obligation, indebtedness or liability incurred by the Debtors to the Postpetition Agent and the Postpetition Lenders under the DIP Credit Agreement prior to written notice to the Postpetition Agent of the effective date of such reversal, stay, modification or vacation, or (ii) the validity and enforceability of any lien or priority authorized or created hereby or pursuant to the DIP Credit Agreement with respect to any such obligations, indebtedness or liability. Notwithstanding any such reversal, stay, modification or vacation, any use of Cash Collateral, or any indebtedness, obligation or liability incurred by the Debtors to the Postpetition Lenders prior to written notice to the Postpetition Agent of the effective date of such reversal, stay, modification or vacation shall be governed in all respects by the original provisions of this Order, and the Postpetition Agent, the Postpetition Lenders, the Prepetition Agent, the Prepetition Secured Lenders and Kodak shall be entitled to all the rights, remedies, privileges and benefits, granted herein

and/or pursuant to the DIP Credit Agreement with respect to the Postpetition Financing and all uses of Cash Collateral and such indebtedness, obligation or liability. The obligations of the Debtors under this Order and the Postpetition Financing shall not be discharged by the entry of an order confirming a plan of reorganization in the Cases and, pursuant to Section 1141(d)(4) of the Bankruptcy Code, the Debtors have waived such discharge (such obligations being payable in accordance with the terms of this Order and the Postpetition Financing).

26. Nothing herein shall preclude the Prepetition Agent or any Prepetition Secured Lender from (i) exercising all rights and remedies or seeking any relief available under the Bankruptcy Code and the Bankruptcy Rules in connection with the Cases, and (ii) objecting to any amendment, modification or waiver under the DIP Credit Agreement, including any extension of the term of the Postpetition Financing or any increase in the Total Commitment (as defined in the DIP Credit Agreement) under the DIP Credit Agreement or any motion by the Debtors for an order authorizing the incurrence of debtor-in-possession financing from any group of financial institutions other than the Postpetition Secured Lenders. The Debtors shall provide copies of all financial statements, reports, motions and other information provided to the Postpetition Lenders under the DIP Credit Agreement concurrently to the Prepetition Secured Lenders.

27. Upon the rejection by the Debtors of any lease, the security interests and liens of the Postpetition Agent and the Postpetition Lenders shall be released and extinguished with respect to such lease without further order of the Bankruptcy Court.

28. The notice given by the Debtors of the Motion and of the Final Hearing constitutes due and sufficient notice of the Motion and of the Final Hearing.

29. This Order shall supersede and govern over the terms of the Documents, to the extent that such terms are inconsistent with this Order.

Dated: Atlanta, Georgia July 26th, 2001

/s/ C. Ray Mullins
C. RAY MULLINS
UNITED STATES BANKRUPTCY JUDGE

Prepared and presented by:

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APPENDIX J

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CHAPTER 11

01-83470-crm

In The Matter of: WOLF CAMERA, INC.

(Hearing on Motion to Approve Compromise (Application *for Order:* (i) Approving Stipulation of Settlement; (ii) Dismissing Committee Adversary Proceeding and (iii) Allowing Secured and Unsecured Claims of Pre-Petition Secured Lenders) and Notice of Hearing thereon filed by David A. Geiger on behalf of Wolf Camera, Inc.

VOLUME I

A transcript of the proceedings heard before THE HONORABLE C. RAY MULLINS, commencing on or about 10:00 a.m., July 16, 2002, in the above-captioned matter, heard at the Richard Russell Federal Building, Courtroom 1203, Atlanta, Georgia, before Deborah P. Longoria, Certified Court Reporter in and for the State of Georgia, CCR--B-1557, RPR.

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ATLANTA, GEORGIA 30309
(404) 876-8979

* * * *

[9] submit that the settlement is undeniably within the best interest of the estate because it provides for a possible benefit to unsecured creditors once the $40 million threshold is

reached and because it stops the bleeding in terms of professional fees and administrative expenses that would have been charged to the administrative expense fund had the litigation with the creditors committee proceeded.

The only objection that has been filed to the application is the limited objection by Kodak regarding its attempt to preserve its claims against the bank group.

One of the reasons for the bank group's willingness to settle, and this is clear from the language of the stipulation, one of the reasons for its willingness to settle with the committee on the $40 million basis was, as set forth in paragraph 10 of this stipulation, the condition that the Kodak subordination agreement be enforced.

Paragraph 11 of the stipulation reserves Kodak's opportunity to be heard on that issue. That opportunity, we submit, is today, your Honor.

The bank group's counsel is prepared to point out, as I understand it, the reasons why the subordination agreement should be enforced. But before I turn the lectern over to the bank group's counsel, or whoever is going to speak next, I will wish to make it clear the debtor's position, which is that it is in the best interest of the estate for the creditors committee [10] adversary proceeding to be fully and finally settled, which means, as a necessary prerequisite, that the Kodak subordination agreement must be enforced. Otherwise, the bank group's settlement with the committee will be void.

The settlement with the committee is the linchpin of the plan of liquidation that we filed yesterday; and without the settlement, we don't have a plan.

I submit that enforcement of the Kodak subordination is consistent with the position Kodak took throughout the Ritz sales procedure. It did not raise the issue of equitable subordination during that process; it didn't raise the issue of enforceability of the subordination agreement.

Moreover, your Honor, the debtors do not believe that the issue of enforceability of the subordination or the relative priority of the bank's claims and the Kodak claims should be litigated in Rochester or any other court other than this court.

We've filed a motion—we haven't filed a motion. We're serving a motion on Kodak in the next couple of days to seek to intervene in the case in Rochester for the purpose of being a movant to try to have that case either dismissed or transferred down to this court because I think this court is where that issue belongs.

Your Honor, if we have prolonged litigation in this case between the creditors committee and the banks and between Kodak and the banks concerning priority of the claims and concerning

* * * *

[35] MR. SKLAR: Well, that's it primarily, your Honor, that it's clear from the record that there's nothing in this agreement which would affect third-party claim.

THE COURT: Okay. Is that the total of your objection now?

MR. SKLAR: Yes, your Honor.

THE COURT: Okay. All right. Okay. Anything else you want to add before Court rules or hears from any other parties?

MR. SKLAR: I just wanted to check—yes, the same in paragraph 5, your Honor.

THE COURT: Hold on, Mr. Sklar.

What is your position on it?

MR. TEITELBAUM: Your Honor, paragraph 5, it's clear from the paragraph that it's the committee and the debtors

issuing the release, so I really don't believe that it's appropriate to modify that paragraph.

THE COURT: Okay. Anything else, Mr. Sklar? Because I just want to find out where there's disagreement, then the Court will rule. Any other matter?

MR. SKLAR: No. I believe that's it, your Honor.

MS. CUSKER: Dan, paragraph 11, we want to make clear that this does not constitute our notice and opportunity to be heard.

MR. SKLAR: Right.

THE COURT: Excuse me. Who is speaking? You have to [36] identify yourself.

MS. CUSKER: I'm sorry. Judge Mullins, this is Dorothy Cusker, in-house at Eastman Kodak Company. And I apologize and I thank the Court for letting us participate by phone. I know how irritating it must be for all of those who are there in Atlanta.

THE COURT: Okay. Go ahead with your comment, and we'll see what the reaction is.

MR. SKLAR: Yes, just to reiterate that this isn't the hearing on the enforcement of the subordination agreement under paragraph 11.

THE COURT: All right. Well, okay, I just want to make sure I get everything that you have, and then we're going to resolve everything. So is that it?

MR. SKLAR: Yes, sir.

THE COURT: Ms. Blitch is standing up, so let's hear from Ms. Blitch and then—

MS. BLITCH: Dan, I think, just speaking to paragraph 5, the problem is that in paragraph 6—

THE COURT: Wait. Are you a conflict in; are you in or out?

MS. BLITCH: Oh, I'm sorry, I was just talking about ambiguity of language so this is just going to—

THE COURT: You better be careful now. Are you in or out?

MS. BLITCH: You're correct, your Honor. I guess my [37] understanding was that I could speak to ambiguity of language but not substantive issues.

THE COURT: I think objection is objection.

MS. BLITCH: All right.

THE COURT: All right. No problem, Ms. Blitch. Okay. With that, I'll hear—Mr. Teitelbaum is standing up to address this, and we'll go forward.

MR. TEITELBAUM: Your Honor, I'm not precisely sure about what the point being made on paragraph 11 is. But, your Honor, I would just point the Court to the notice of hearing in connection with this motion that was filed, which says, Your rights may affected and, by the Court's rulings, you should read these pleadings and you have an opportunity to be heard. Today is the opportunity to be heard on this stipulation.

Kodak has filed its pleading. It's made its objection. We believe that this was their opportunity to be heard. I'm not sure what it is they're trying to preserve with respect to an opportunity to be heard, to reargue. If they want to have their remedies, they can have them. But this language is not—changing this language would not be acceptable.

THE COURT: Okay. All right. Hearing from all the parties, then the Court is prepared to enter its ruling.

As stated, this was a heavily contested matter, the committee's lawsuit. And the Court obviously puts a lot of its faith in the fiduciaries that are before the Court.

[38] Court will note that all of the constituencies in this case have excellent representation. Committee was represented in a very diligent, excellent fashion. As the case came in, it was clear that they had an uphill battle. And yet, Mr. Sacca and Mr. Kurzweil, every turn, fought tooth and claw to get as much as they could for their constituencies.

The banks were well represented, obviously. And every party in here had good representation. And this was a fast-moving case with a lot of issues, and the Court entered orders based on the pace of the case.

The Court believes that, at every single turn, whenever there was a dispute, that it gave all the parties ample opportunity to present witnesses, to present documents, and that complete records were made at every juncture to effectuate the hearings before the Court. And so there is a lot of history in this case or a lot of orders that the Court has entered.

What is before this Court this morning, in its view, is simply the settlement of this proceeding involving the banks, the committee, the debtor under Bankruptcy Rule 9019.

The Court has heard from the committee, quite cogently from Mr. Sacca, of why they made the decision to enter this settlement. And the Court, being aware of all the issues raised, and Mr. Sacca is right, we had several discussions in here about the valuation issue on the collateral leases, the Court agrees with the parties it would have been fascinating and the Court [39] would have liked to hear from some of the experts but it would have also been extremely expensive and the banks probably would have, you know, rebelled at their cash being spent in Such a tact, and we'd have to deal with it.

But nonetheless, .that's where we find ourselves in a lot of these bankruptcy cases. And I think the committee fought as hard as they could and then, when it looked at the landscape, made the best decision it could under the circumstances.

The Court gives a lot of discretion and leeway to those decisions. And if the committee, ably represented, believes that this is in the best interest of the estate as they find it, I'm sure there are some things they wish would be different, but they've made their decision under the facts and circumstances in front of them. And the Court believes that their view of the situation is an accurate one.

Hearing from the debtor, the Court has heard several points in this matter at various status conferences; various pretrial hearings. Hearings of almost every nature, the Court would inquire about where this thing stood on administrative basis, whether it was administratively solvent, where parties stood, and etc., and that when were we going to get a plan of reorganization. And I was told, quite uniformly, that much of the plan, whether a plan could be presented and prosecuted would depend upon whether there was some resolution to claim litigation that the committee was contemplating bringing and actually [40] brought and that any other party would bring within the time frame, and so the resolution of that.

Now, there is a plan that was filed yesterday, and I think this Court certainly was looking for that and asking for that for several months and believes that that is the way that this thing could come to some ending point and preserve whatever value there is for the constituencies in the case.

And that is what the Court believes then and now is in the best interest of the estate, not to spend the remaining funds in litigation; that, at the end of the day, no party would be served. And so the fact that we now have a plan on table, the Court views as positive.

So based on the—and also the bank's view of the difficult nature of the litigation and also echoed the fact it would be very expensive litigation; and because of that, they also decided to make some concessions and enter into the settlement. So everyone gave a little bit to effectuate this settlement, based on the economics that were in place after this Court approved the settlement. Once the numbers were there, everybody had to get comfortable, with the numbers and that was just it.

And so based on all those concerns and the comments from all those parties, and the Court finds that they're all well merited, that it's in the best interest of the estate to approve this motion under 9019.

[41] The Court also notes that prior to even the presentation made, the Court recalls several instances where the *Kodak* subordination agreement was brought up in hearings and the Court remembers that, you know, it was in no question that in the Court's mind that the subordination agreement was enforceable.

It mentioned that, in the consideration on the objection to the sale, its noted in the—in Kodak's own pleadings and it had mentioned several times in the cash collateral order, it's highlighted in the 9019 motion, so I don't believe there's any real surprise, I don't think there's anything real new about it, and so the Court is of the view that this really is not striking any new ground. Its just merely tying up some ends based on prior rulings, prior orders, and prior positions of the parties in the case.

So the Court finds that that agreement is enforceable and will approve the 9019 motion. Court notes, as I think that, Mr. Teitelbaum, you had agreed, I think paragraph—is it 2—to add the committee language at the end?

MR. TEITELBAUM: Yes, your Honor. I have an interlineated copy that, with permission, I can hand up.

THE COURT: Okay. All right. And on that basis, the Court will approve the stipulation.

Mr. Kelley?

MR. KELLEY: Point of clarification. Your Honor ruled that that agreement is enforceable. Was your Honor referring to [42] the subordination agreement?

THE COURT: Yes. And basically that the order that the Court had previously, stipulation that I previously read, and I take it that the only change is that interlineation, I believe that this order is appropriate to enter.

So any effect of the order, as I read this stipulation, I'm not making any comment about the suit, Mr. Sklar, in Rochester. I'm not making any comment about whether the venue was appropriate. I'm not making any comment about whether it's timely. It's simply not before the Court this morning.

And at some point in time, there's going to be a hearing in Rochester or here, and the Court will make—will hear you out fully, Mr. Sklar, in any position with regard to that litigation when it comes before this Court. It may be that Judge Ninfo hears it but that's simply not before the Court this morning.

MR. TEITELBAUM: Your Honor, thank you very much. And before we close the record, just one procedural matter. Can we just have the record reflect that the two binders are admitted into the record of this Court, maybe 1 and 2, the various subpoints?

THE COURT: Okay. Are there any objections to the admission of the binders? I've looked through them and they both appear to be almost uniformly court pleadings and transcripts. Any objection by any parties to admitting Binders 1 and 2.

* * * *

CERTIFICATE

GE0RGIA:

FULTON COUNTY:

I, Deborah P. Longoria, Certified Court Reporter and Notary Public in and for the state of Georgia at large, do hereby certify that the foregoing proceedings were taken down, as stated in the caption, and the questions and answers thereto were reduced to computer printed pages by me, that the foregoing pages 1 through 43 represent a true and correct transcript of the proceedings as they transpired; that I am not a relative, employee, attorney or counsel for any of the parties; that I am not a relative or employee of any attorney or counsel for any of said parties; nor am I financially interested in the action.

This, the 25th day of July, 2002.

/s/ Deborah P. Longoria
DEBORAH P. LONGORIA
Certified Court Reporter
CCR-B-1557, RPR

APPENDIX K

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CHAPTER 11

01-83470

ATLANTA RETAIL, INC., f/k/a WOLF CAMERA, INC.,
Debtor.

ATLANTA RETAIL, INC., f/k/a WOLF CAMERA, INC., ATLANTA RETAIL SUBSIDIARY, LLC, f/k/a WOLFXPRESS.COM, LLC, ATLANTA RETAIL, L.P., f/k/a TEXAS PHOTO FINISH, L.P., AND ATLANTA RETAIL PARTNER, INC., f/k/a FOX PHOTO PARTNER, INC., AND WACHOVIA BANK, NATIONAL ASSOCIATION, f/k/a FIRST UNION NATIONAL BANK,
Plaintiffs,

VS.

THE EASTMAN KODAK COMPANY,
Defendant.

(Hearing on Plaintiffs' Motion for Preliminary Injunction)

Transcript of proceedings heard before THE HONORABLE C. RAY MULLINS, commencing on or about 10:00 a.m., November 12, 2002, in the above-captioned matter, at the Richard Russell Federal Building, Courtroom 1203, Atlanta, Georgia, before Frances Buono, Certified Court Reporter in and for the State of Georgia.

[57] State Court claims were ever decided in this Court, which I would respectfully submit under Howell, they were not.

In particular, in respect to the second issue raised by counsel, the matter was removed to the District Court by Wachovia after being started in the State Court. The grounds given for removal were diversity. Wachovia did not allege to Judge Telesca that these matters arose under Title 11. And, in fact, therefore, stipulated that there was no independent source of federal jurisdiction for purposes of the removal to Federal Court.

Now in this court, it says, well, gee, everything in Rochester is really all tied up in this bankruptcy. If you take the time to slowly read the orders, to slowly read the documents, and I apologize that I wasn't here for the long period that this case has gone on, and I can't say I regret the opportunity of not having been here, it's like being hung at the county fair, it's an honor I can do without, but I am trying to do the best I can for Kodak and indicate the only issues left to be adjudicated deal solely with claims as to what Wachovia did or did not do in respect of Kodak, and they have no effect whatsoever on the plan or the distribution except to the extent that Wachovia introduces this threat that they will vote no.

Thank you, Your Honor. Thank you for your patience.

THE COURT: Thank you. This is obviously a very weighty matter. The Court has looked at voluminous documents. The [58] briefs came in late last week. The Court has had a chance to review the pleadings once through and review some of the cases.

Whenever you get into jurisdiction and core, noncore issues and third-party claims and actions, you get into a plethora of cases and issues that go right to the heart of the Court's jurisdiction. So I recognize that this is a very important issue and one that is not considered lightly.

Just some overall observations. Mr. Thomas, you made the observation that you weren't here, and sometimes I wish I wasn't here, either. But nevertheless, we take the cases as we

find them. And this was a heavily litigated case. Mr. Sacca and Mr. Kurzweil, very aggressive, good creditor committee lawyers, I know they engaged in a lot of discovery. I'm sure they got out all the documents and reviewed them. And they had an opportunity to spend a lot of time before they decided to bring their lawsuit. They did so and engaged in a lot of discovery.

This Court on several occasions, every single time there was an issue that had to be litigated, this Court told all the parties that it would provide ample opportunity to litigate, bring witnesses. So almost every point along the line was heavily litigated, even down to the terms of the bid, disclosure of information of the bidder, 363 sale, went on for several days ending up at 7 o'clock at night. The settlement process went through multiple hearings.

And all along the Court expressed to the parties that [59] what was the Court's method to, you know, providing all this opportunity was to try to get everything out on the table and to try to deal with all the claims, all the issues. Obviously, this was a unique arrangement, seeing Kodak here as a prepetition lender when it didn't kind of fit the list of financial institutions. I started looking at banks and saw Kodak here, and something was out of place. But nevertheless, it's in a mix.

And Mr. Sklar was here at almost every hearing, and when he wasn't here at the hearings, he participated by phone. He also had Jones Day, his local counsel for awhile, Ms. Blitch was here. And almost at every turn, Kodak opposed the debtor, and the banks certainly opposed the sale very vigorously and so forth. And we got a lot of evidence out on the record.

Kodak filed an objection to a 363 sale, and the Court dealt with the subordination agreement there and in other hearings that the Court found that, specifically that Kodak had

acknowledged the existence of that. And it is a 363—excuse me. On the 9019 motion, I note that Kodak's general counsel and Mr. Sklar appeared by telephone, and we went through—there was ample opportunity.

That was noticed up, the language of the settlement was pretty clear. Questions were asked on the record for clarification. And I thought it was very clear that what was trying to be accomplished here was a wrapping up of all the issues related to the extent/priority and validity of all the [60] liens, and necessarily, that meant Kodak also. I mean, Kodak had a claim in here, and it had a claim against the debtor as well as the banks. And much of what the 9019 motion was, was to resolve that, and it gave everybody an opportunity to say if they objected, to put that at issue.

And I certainly, fitting the same procedure that I have set with everything else in this matter, had Kodak come in at 9019 and wanted to, you know, allege any of these items or put on evidence on the claim of Wachovia and the banks, we certainly could have had that.

So again, all I say that for is by background, is that one of the over-arching concerns of this Court, once this case looked like it was going to be sold very quickly, it didn't look like it could stand on its own very long, the Court had to make that determination and after hearing evidence, made it.

Then the Court was trying to do what was best for the estate, all creditors and keeping in mind what the Court always does, is judicial efficiency, giving everybody an opportunity to air whatever they need to air, whatever length it takes, however many days of hearing it takes, get what you have and have your points made, briefs, witnesses, if needed, and then move on down the line.

Having said that, both sides have briefed this matter well, Mr. Thomas and Mr. Teitelbaum, Mr. Kelley made very cogent arguments respecting their various positions.

[61] Mr. Teitelbaum made an observation that I had kind of made earlier this morning in thinking about this, and that is, you know, putting things in context, I mean, the first reaction *that this Court would always* have is, okay, there is Kodak and Wachovia over in another jurisdiction arguing or having a suit on, this is a breach of contract; what does that have to do with me? So that would be my first reaction when I saw the motion.

But then we do a step by step back, and I look at, okay, what's this in context of? And what all happened in the bankruptcy proceeding. And it seemed like to the Court that at various times Kodak through counsel, Mr. Sklar, many times, seemingly came up to the edge of this several times in the proceeding, but it never pushed it over the edge, and I don't want to say this in a pejorative sense, but held it back. And I don't mean that in a pejorative sense.

And from that point, it seemed almost tactical that the bank did change position that they did let their cash collateral be used, they did agree to have $25 million of administrative expenses funded, which they wouldn't have had to do., you know.

I don't know what is in their mind, but having practiced, I don't think they would have done that and tried to wrap it up if they thought that this was just a preliminary matter and then they had to go to battle on their claim at some later date. And that's where I think that the importance comes in in the concept of, you had a chance to raise it.

[62] So there is a lot of detail about jurisdiction and core and noncore, but there is also the core equity in here. And when you're talking about issues that could have been raised, I think it is peculiarly important in a Chapter 11 case like this in that, you know, if all the parties are represented by good counsel. Certainly in this case no one could say any different. You have nationally renowned firms representing the debtor,

the committee, Kodak, Wachovia, and all sophisticated Chapter it practitioners And it just seems to the Court that if this litigation outside, if it's not clearly standing on its own as an action that the Court would have jurisdiction, it wouldn't have caused as much problem.

But the Court just remembers multiple occasions when so much of this information was at issue and what the claims were and who had the claims and so forth, that there was several opportunities to bring some of this up. And then if there were jurisdiction issues or something, they could have been dealt with at that point, but before too much water got over the bridge.

I think it's somewhat—it doesn't help the process to finality and engaging in compromise if after, you know, you got cash collateral orders they become final, after you have 363 motions, they become final, and then there was even a motion to distribute after 336 that was litigated. Then you had the committee taking time to look, Mr. Sacca and Mr. Kurzweil, came in and they, you know, wanted accountants and so forth. And so [63] we went through a lot there, but they got their opportunity. They brought the suit, and then they engaged in settlement.

I know Kodak was an ex-officio member. I'm not saying they were bound to everything. But they sat with Mr. Kurzweil and Mr. Sacca at the counsel table and consulted on a lot of dispositive motions and proceedings that were brought before this Court. And the Court can't help feeling that this action that is pending now, that it all kind of relates to the relationship prebankruptcy. And then once the filing came down the pike, as soon as the sale is approved, then you really have to get down to brass tacks to extent, validity and priority of liens.

And it seems to the Court that, notwithstanding it is couched in terms of just purely a breach of contract, and it

has nothing to do with anything else, the Court begs to differ. And I think they do have some ties to it, and it has something to do with the Court's enforcement of its own orders.

And so I don't think it is a clear-cut case of the Court lacking jurisdiction. I think that it is tied up with it, and put it in the context.

And again, Mr. Thomas, you weren't here, and maybe you were the lucky one during a lot of these hearings, but there was ample opportunity, and as a matter of fact, the Court thought at certain points in time, that things like this were going to come out, and it just did because there was always seemingly percolating below the level something else. I mean, you know, [64] Kodak was taking the position, it seemed like there was always something else.

For instance, in the 9019, there was some talk about what that meant and so forth. And I thought I made it very clear that what the Court's intention was through this is to resolve all disputes regarding claims and everything. Let's get them on the table, let's resolve them. And I was trying to send a signal to everybody, if you have any problems with anything, now is the time to bring them up, and that's what I wanted to encourage.

And like I said, you know, when you talked to parties or lawyers around here, if you have disputes here, nobody has a shortage or difficult time getting hearings in front of me. I don't know what else could be said, but I don't think *that* could be said, and because I think that is the truth, get everything out on the record.

But I think in terms of the working a case like this, it seems counterproductive to have the suit come—the timing and how it happened and then you have it. For instance, the first suit, I looked at, and to be honest with you, I just couldn't make it out because it had the Wolf caption, but it was in Bankruptcy Court in Rochester. And I couldn't quite figure out how that

could be, but nonetheless, I made the observation at the 9019 that I wasn't passing on the merits of that. By saying that, I didn't mean to suggest that I found that it was a proper proceeding or it didn't impact any orders, [65] it just, at that particular time, I didn't think that made a difference with respect to what I was doing because I made it clear I was trying to wrap up everything.

And so when that happened, the parties had to make their own decisions. And before the Court could get involved any more whatsoever, that case got dismissed, and I became aware it was a voluntary dismissal.

And then it gets refiled, and the Court notes again before I even got the computer-generated compare document, when I first got the pleadings early last week, I just laid the complaints down myself and then started going through them. And they looked almost identical except for the subordination.

And somehow the Court feels that, you know, the first one was dismissed because it seemed like it was tied up with these proceedings we had on the 363 motion.

But again, the overriding concern from the Court is that the opportunities to finally determine them were given. And I think the process is for, if an action like this is taken outside this context, and it even has to do with timing, not necessarily, you know, I don't know in isolation whether it has to be in front of me, but at least timing while things were fresh before, you know, money was loaned out, before money was distributed, before money was, you know, set aside for administrative claims, that money can't be brought back in.

I mean, people were paid money. You can't bring that [66] back in. Cash collateral was, usage was allowed, and the debtor took advantage of that. The sale has taken place. Creditors have been paid. Professional fees have been paid, and all that came out of the bank's collateral. And, you know,

they can, I think, rightfully expect to—if that is the case, and they are taking a haircut also, not as big as Kodak at this point, but they took a haircut, too. And part of the justification for taking a haircut is if I can somehow draw a fence around my exposure in this case for this, and I think Kodak, again, being a sophisticated entity, a large company, having sophisticated counsel, sitting here hearing me announce that several times at different postures, certainly, I think was aware that what the Court was attempting to do with its orders is roll up-everything so there wouldn't be questions later about extent, validity and priority of liens.

And I again, you know, I understand that Kodak has taken the position that this is not what the action is about, but again, this Court is looking at it in-context of the history of this case and Kodak's participation in it and interest in it and feels that it does relate to the actions.

This is a preliminary injunction application by the debtor and Wachovia. And Kodak has indicated that it believes the Court ought to look at it under the standard preliminary injunction model which looks at the—one, whether there has been a substantial likelihood of a showing of success on the [67] merits; two, irreparable injury or harm; and three, whether the balancing of harms, whether this would cause a substantial harm to one side or the other. I don't think the public. interest is served. Therefore; one kind of gets the short shrift.

But to the extent you look at that, I think there is a lot to be said about any party's participating in bankruptcy trying to—whether it be settled, compromise or what have you, have any—everything done within the court and getting some finality to it. I think it benefits every one.

The bank has suggested that given the nature of the action that it is somewhat of a reduced standard or a different standard. But I'll take the standard I think that probably is a

little more onerous for the bank, and that's what's been announced by or set forth by Kodak.

And I believe that there has been a showing of success on merits. I think interpreting these agreements and orders of the Court, and along with what the Court remembers about its own orders and its own findings over multiple periods of time, and providing the opportunity to wrap all this up, believes that showing has been made.

Irreparable injury or harm, again, I think in terms of, that has been met in terms of, you know, the importance of finality of orders, encouraging settlements, encouraging people to come forward and participate without fear of getting collaterally attacked and so forth.

[68] And whether this would cause substantial harm, you know, a balance of harms, I don't really see that as much of a factor given that both the—well, the debtor would fit this. Certainly the bank and Kodak, again, substantial entities with substantial assets, having the ability to fund legal fees to bring and prosecute difficult actions like this, its certainly not the Court's intention to take away or rule on the merits of the action. And so I don't believe that there is any substantial harm caused to Kodak by a preliminary enjoining of this particular action, giving the Court an opportunity to look at it further.

So based on that, and anything the Court decides to supplement in an order, the Court will grant a preliminary injunction with respect to the action pending in the District Court in New York and – excuse me one second.

So the Court will enter that preliminary injunction. What I'm going to do, though, I want to, because of the, again, substantial authority provided, I want to go ahead and set up, and I'll let the parties, if they want, if you want a minute, I can step out and let the parties look at the calendar or something, set up a hearing on the next phase of this.

I will be glad to listen to both sides, if you can't agree, on how to proceed. So why don't I at this point take about 10 minutes, 15 minutes, and let you all talk. And just let us know. And if you think it's going to take more time and you [69] need to break and talk to folks and want to come back after lunch, I'll be very flexible. Anything you need to have, just let me know. So why don't we take a break now, and just in about I would say 10 to 15 minutes, just let me know where you are or whether we need to come back this afternoon or however you want to do it.

(A recess was taken.)

MR. TEITELBAUM: Your Honor, after discussing this amongst ourselves and discussing this collectively, we decided that what we need to do is go back, chat with our clients about some scheduling matters, but we have a rough estimate of how things would likely progress.

THE COURT: Okay.

MR. TEITELBAUM: Whether it is by a motion to dismiss and then cross motion to try to deal with the legal issues and then briefing schedules to accommodate the Court's schedule.

THE COURT: Well, I'm going to work around you guys. I will try to accommodate you on those difficult issues. So to the extent possible, I will work around you guys and work with you and try to get you what we have.

I mean, I kind of penciled in, just so you know, just, you know, we're entering a holiday season, so trying to find days where we could open it up to give you guys all the time you need. I know two days we looked at are like December 16th and December 9th are Mondays, and I can devote the whole day if necessary.

CERTIFICATE

GEORGIA:
FULTON COUNTY:

I, Frances Buono, Certified Court Reporter and Notary Public in and for the state of Georgia at Large, do hereby certify that the foregoing proceedings were taken down, as stated in the caption, and the questions and answers thereto were reduced to computer printed pages by me, that the foregoing pages 1 through 72 represent a true and correct transcript of the proceedings as they transpired; that I am not a relative, employee, attorney or counsel for any of the parties; that I am not a relative or employee of any attorney or counsel for any of said parties; nor am I financially interested in the action.

This, the 14th day of November, 2002.

/s/Frances c. Buono
FRANCES C. BUONO, CCR-B-791
My commission expires on the
24th day of April, 2003.

APPENDIX L

EXHIBIT A

FACTS

I. Background: The Financial Agreements Among Kodak, Wolf and The Lenders

7. Wolf operated and owned a national chain of full service specialty photo stores under the Wolf Camera name.

8. Kodak was a major supplier of photographic film, paper and chemicals to Wolf.

9. In 1992, Wolf and Kodak formalized their long-standing relationship by entering into a supply and financing agreement with a ten (10) year term (the "Loan and Purchase Agreement").

10. Pursuant to the Loan and Purchase Agreement, Kodak agreed to provide Wolf with[:] a loan to finance an expansion of the Wolf chain of retail stores and specified pricing on Kodak products.

11. The loan made by Kodak to Wolf pursuant to the Loan and Purchase Agreement was secured by substantially all of the assets of Wolf (the "Kodak Lien").

12. At that time, FUNB had an existing loan to Wolf which was also secured by substantially all of the assets of Wolf (the "FUNB Lien").

13. At or about the same time, Kodak also agreed to guarantee an existing loan by FUNB to Wolf up to Three Million Dollars ($3,000,000.00) and also agreed to sub-ordinate the Kodak Lien to the FUNB Lien.

14. In 1996, the Loan and Purchase Agreement was amended and Kodak agreed to provide for an additional loan of Eight Million Dollars ($8,000,000.00) and to extend the term of the Loan and Purchase Agreement to 2006 and to

provide Wolf with the option to increase the Kodak guaranty of the FUNB debt up to Twenty Million Dollars ($20,000,000.00).

15. The principal purpose of the 1996 amendments was to provide Wolf with additional credit to finance the further expansion of its chain of stores, which was anticipated to increase the purchases by Wolf of Kodak products for use in its stores, and the marketing of Kodak products through Wolf's retail outlets.

16. In the second calendar quarter of 1998, FUNB increased the maximum amount of the revolving line of credit it provided to Wolf to Sixty Million Dollars ($60,000,000.00).

17. Contemporaneously with the increase of the FUNB revolving line of credit to Wolf, Wolf exercised its option to increase the amount of the Kodak guaranty of Wolf's FUNB debt to Twenty Million Dollars ($20,000,000.00).

~~[18. On September 1, 1998, Kodak sold all of the stock of its wholly owned subsidiary, Fox Photo, to Wolf for Thirty Three Million Dollars ($33,000,000.00) (the "Fox Photo Transaction").]~~

18. [~~At the time~~]On or about September 1, 1998, Kodak entered into a transaction with Wolf wherein it financed Wolf's acquisition of [~~the sale~~], [~~the assets of~~] Fox Photo [~~consisted of~~], including a chain of approximately four hundred fifty (450) retail photography supply and film developing stores.

~~[20. Three Million Dollars ($3,000,000.00)]~~

19.]Upon information and belief, this was one of [~~the purchase price for FoxPhoto was financed by Kodak, as evidenced by~~]a [~~promissory note dated September 1, 1998 made by Wolf payable to the order of Kodak~~] number of acquisitions by Wolf to enlarge its national chain of retail photography stores.

20. [~~In connection with~~]At or about the [~~Fox Photo Transaction~~]sametime, Wolf and Kodak entered into [~~a certain~~]an Amended and Restated Loan and Purchase Agreement and other associated loan documents, all dated September 1, 1998 (collectively, the "Kodak Amended Loan and Purchase Agreement"), which are expressly governed by New York law.

21. [~~In connection with~~]Also at or about the [~~Fox Photo Transaction~~]same time, Wolf and FUNB, as a lender and as an Administrative Agent for the other Lenders, entered into a Credit Agreement and other associated loan documents, all, dated September 1, 1998 (collectively, the "FUNB Credit Agreement").

22. Pursuant to the FUNB Credit Agreement, FUNB, as a lender and as agent for the other lenders, made a commitment to lend to Wolf up to One Hundred Million Dollars ($100,000,000.00) on a revolving line of credit.

23. Pursuant to the FUNB Credit Agreement, FUNB, as a lender and as agent for the other Lenders, obtained a lien upon substantially all of the assets of Wolf.

24. In connection with the Kodak Amended Loan and Purchase Agreement and the FUNB Credit Agreement, [~~Kodak, -~~]FUNB, as Administrative Agent on behalf of the other Lenders, Kodak and Wolf entered into a Subordination Agreement dated September 1, 1998 (the "Subordination Agreement").

25. Pursuant to the Subordination Agreement, which was expressly governed by New York law, Kodak agreed to subordinate its right to receive payment on the debt then owed to it by Wolf and its right to receive payment from Wolf under any future promissory notes issued under the Kodak Amended Loan and Purchase Agreement to the right of FUNB and the other lenders to receive payments under the FUNB Credit Agreement.

26. Further, pursuant to the Subordination Agreement, Kodak agreed to subordinate its right to receive payment on the debt owed to it by Wolf to the right of FUNB and the other lenders to receive payments under the FUNB Credit Agreement.

27. Also, pursuant to the Subordination Agreement, Kodak agreed to subordinate its right to receive payment on any obligations owed to it by Wolf pursuant to any subrogation, contribution or indemnity rights that may have accrued to Kodak by reason of Kodak's guaranty of Wolf obligations to the [~~Defendants~~]Lenders to the right of the [~~Defendants~~]Lenders to receive payments under the FUNB Credit Agreement.

28. In connection with the Kodak Amended Loan and Purchase Agreement and the FUNB Credit Agreement, Kodak, FUNB, as Administrative Agent on behalf of the Lenders, and Wolf also entered into a certain Intercreditor Agreement dated September 1, 1998 (the "Intercreditor Agreement").

II. FUNB Breaches Its Obligations to Kodak

29. Pursuant to the Intercreditor Agreement, which was expressly governed by New York law, FUNB and Kodak were each obligated to use their best efforts to provide the other with notice of its actions "which may significantly affect the other Secured Creditor with regard to the ability of [Wolf] to meet its obligations to the Secured Creditor."

30. This notice obligation was particularly important to Kodak because, as a subordinated lender, it necessarily had to rely on FUNB, as the agent of the senior lenders, to disclose information FUNB learned of concerning Wolf, and specifically and particularly any actions that FUNB might take which would adversely impact Wolf's ability to comply with all of its obligations to Kodak.

31. Pursuant to both the Subordination Agreement and the Intercreditor Agreement, Kodak and FUNB, acting for all of the Lenders, had an express duty not to act in bad faith.

32. Upon information and belief, in July 1999, Wolf's financial projections indicated a shortfall in its projected EBITDA (Earnings Before Interest, Taxes, Depreciation and Amortization), which meant that Wolf would require additional capital to remain in compliance with certain financial covenants contained in the FUNB Credit Agreement (the "Credit Agreement Financial Covenants").

33. [~~In~~]Upon information and belief, in or about July 1999, Wolf informed FUNB of its need for an increase in its borrowing ratios under the FUNB Credit Agreement as a result, in whole or in part, of the projected decrease in EBITDA.

34. Consistent with their past practice and course of conduct, FUNB and Wolf sought and obtained Kodak's consent to a modification of the FUNB Credit Agreement to increase temporarily the borrowing ratios.

35. During the second half of calendar year 1999, and continuing into 2000, Wolf and Kodak entered into negotiations concerning an additional investment by Kodak in Wolf to finance Wolf's continuing expansion efforts.

36. Upon information and belief, FUNB encouraged, supported and approved Wolf's request of Kodak for an additional capital investment.

37. Wolf communicated the status of its negotiations with Kodak to FUNB on a regular basis, and FUNB offered observations and guidance to Wolf in the conduct and structure of those negotiations.

38. Wolf and its advisors represented to Kodak repeatedly during these negotiations that further investments were being sought by Wolf to provide capital to Wolf to enable it to expand its stores.

39. January 29, 2000 was the last day of Wolf's 2000 fiscal year.

40. By February 29, 2000, upon information and belief[,] and unbeknownst to Kodak, Wolf had informed FUNB that Wolf was then in or would soon be in violation of certain of the Credit Agreement Financial Covenants, including the ratio of a portion of Wolf's debt to its EBITDA.

41. [~~As~~]Upon information and belief, as a result of Wolf's financial situation, and FUNB's knowledge of Wolf's actual or potential violation of the Credit Agreement Financial Covenants, FUNB was able to use economic pressure to exert significant influence on financial management decisions being made by Wolf.

42. [~~At~~]Upon information and belief, at or about this time, Wolf also advised FUNB that its projected cash shortages and EBITDA shortfall necessitated a further modification of the Credit Agreement Financial Covenants.

43. On or about March 2, 2000, the Lenders executed a Consent to the Credit Agreement (the "Consent") in contemplation of Kodak's prospective agreement to provide additional financing to Wolf in the amount of Thirty Million Dollars ($30,000,000.00).

44. Pursuant to the Consent, the Lenders allowed Wolf to increase its borrowing ratios, and thereby waived any actual or potential violation of the Credit Agreement Financial Covenants until the sooner of the end of April or the closing of the prospective Kodak financing.

45. Also pursuant to the Consent, the Lenders granted their consent to Kodak's prospective financing to Wolf.

46. At the time the Consent was granted, FUNB and the other Lenders knew that Wolf was in actual or imminent violation of the Credit Agreement Financial Covenants.

47. Pursuant to the Intercreditor Agreement, FUNB was required to provide Kodak with prompt written notice of its actions.

48. Instead, neither FUNB nor any of the other Lenders provided Kodak with written notice of the issuance of the Consent or of the increase in the borrowing ratio, or of Wolf's actual or imminent violation of the Credit Agreement Financial Covenants.

49. In prior circumstances, FUNB had routinely provided notice to Kodak, and had requested and obtained Kodak's written consent to any increase or modifications to the borrowing ratios or other financial covenants.

50. Neither FUNB nor any of the other Lenders provided Kodak with a copy of the Consent.

51. Kodak was unaware of the Lenders' agreement to increase the borrowing ratios, and was also unaware of Wolf's actual or imminent violation of the Credit Agreement Financial Covenants.

52. Upon information and belief, FUNB did not want Kodak to become aware of the Consent or of the covenant violations because that might impair the ongoing negotiations between Wolf and Kodak for further financing.

53. Upon information and belief, FUNB did not want Kodak to learn of Wolf's true financial position because FUNB intended to force Wolf to transfer the proceeds of Kodak's anticipated financing directly to FUNB.

III. Kodak Is Misled

54. On or about March 28, 2000, Kodak and Wolf executed the Second Amended and Restated Loan and Purchase Agreement dated as of March 14, 2000 (the "New Loan and Purchase Agreement"). The New Loan and Purchase Agreement is expressly governed by New York law.

55. Pursuant to the New Loan and Purchase Agreement, Kodak agreed to provide Wolf with an additional loan in the amount of Thirty Million Dollars ($30,000,000.00) interest free, on a term basis, secured by a lien on the assets of Wolf, subordinated to FUNB's Lien (the "New Kodak Loan").

56. Also pursuant to the New Loan and Purchase Agreement, Kodak and Wolf agreed to specified pricing on paper products and Wolf agreed to increase the proportion of the use of certain Kodak products in its stores.

57. Kodak intended that the proceeds of the New Kodak Loan would be used by Wolf solely to finance the expansion and upgrading of its retail store chain and bargained for that specific provision in the New Loan and Purchase Agreement.

58. Kodak anticipated and expected that its business with Wolf would increase as the proceeds of the New Kodak Loan would be used to increase and upgrade Wolf's chain of retail photo stores. Wolf would buy more Kodak products for use in the growing business, and its expanding customer base would also buy more Kodak products.

59. [~~Prior~~]Upon information and belief, prior to the execution of the New Loan and Purchase Agreement, a draft of the document was circulated to FUNB, and by FUNB to each of the other Lenders, for their review on or about March 16, 2000.

60. Section 3.3 of the draft of the New Loan and Purchase Agreement between Kodak and Wolf, which FUNB received, reviewed and, upon information and belief, circulated to other Lenders on March 16, 2000, states as follows:

> 3.3 Use of Proceeds. Wolf covenants to Kodak that it will use the proceeds of the New Term Loan solely to fund new photo retail store development, new photo retail store acquisitions and upgrading the capability of existing and acquired photo retail stores.

(emphasis added).

61. Section 9.1 of the draft of the New Loan and Purchase Agreement circulated to the Lenders by FUNB on March 16, 2000 states as follows:

> 9.1 Use of Proceeds. Wolf shall use the entire amount of the proceeds of the New Term Loan for the purposes described in Section 3.3.

(emphasis added).

62. Upon the Lenders' review of the draft of the New Loan and Purchase Agreement, FUNB, through its counsel, communicated its comments on the draft to Kodak, through Wolf.

63. Through FUNB's counsel, the Lenders requested that the draft of the New Loan and Purchase Agreement be amended to add a provision in which Kodak would, inter alia, reaffirm the Subordination Agreement and the Intercreditor Agreement.

64. FUNB's counsel also requested that it be provided with subsequent drafts of the New Loan and Purchase Agreement and, upon information and belief, Wolf continued to provide FUNB with such documents.

65. FUNB [~~chose not~~]failed to tell Kodak that the Lenders were, at that very same time, requiring Wolf to sign an agreement by which it promised to pay directly to FUNB the entire proceeds of the New Loan.

66. In the same electronic message by which the draft of the New Loan and Purchase Agreement was circulated by FUNB to the Lenders on March 16, 2000, FUNB also circulated a draft of the Sixth Amendment to the FUNB Credit Agreement (the "Sixth Amendment").

67. Pursuant to the Sixth Amendment, the Lenders consented to the New Kodak Loan and revised the terms of the Credit Agreement to reflect certain provisions contained in

the New Loan and Purchase Agreement and the existence of the New Kodak Loan.

68. In one significant respect, however, the terms of the Sixth Amendment directly conflicted with the New Loan and Purchase Agreement. This conflict was obvious and known to the Lenders, who chose to conceal the fact of the conflict from Kodak.

69. In direct contradiction to the Use of Proceeds provision of the New Loan and Purchase Agreement, Section 3 of the draft of the Sixth Amendment to the Credit Agreement, which was circulated to the Lenders on March 16, 2000, expressly granted their consent to the New Kodak Loan on the condition that:

> "(a) all of the Net Cash Proceeds of the New Subordinated Loans, which shall be at least $30,000,000.00, shall be used to repay Revolving Loans outstanding on the date such Net Cash Proceeds are received, immediately upon such receipt;_."

70. Section 3 of the Sixth Amendment actually executed by Wolf and all of the Lenders as of March 28, 2000 was unchanged from the draft of the Sixth Amendment sent to all of the Lenders on March 16, 2000.

71. FUNB [~~chose not~~]failed to provide Kodak with a draft of the Sixth Amendment for review prior to its execution by Wolf and the Lenders.

72. Kodak was not informed by FUNB or any of the other Lenders of the substance of the Sixth Amendment.

73. Sections 3.3 and 9.1 of the final form of the New Loan and Purchase Agreement executed by Kodak and Wolf [~~was~~]were also identical to Sections 3.3 and 9.1 of the draft of the New Loan and Purchase Agreement circulated to FUNB and the other Lenders on March 16, 2000.

74. By its review of the drafts of the New Loan and Purchase Agreement and its transmittal of a specific request only for the addition of a single provision to that document, FUNB falsely represented to Kodak that it approved and consented to the remaining terms of the New Kodak Loan as stated in the draft documents, including the Use of Proceeds provisions.

75. This representation by FUNB was misleading and false; FUNB was at that very time requiring that Wolf agree to breach the express terms of the New Loan and Purchase Agreement.

76. By FUNB's request for only a [~~singe~~]single revision to the draft, Kodak was misled because it [~~reasonable~~] reasonably expected that FUNB would have identified any provision of the documents to which it was not consenting or which was directly inconsistent with and contradictory to a course of action which it intended to pursue and did pursue and intended to require Wolf to pursue as well.

77. Neither FUNB nor any of the other Lenders disclosed to Kodak that the condition[~~of their~~] consent, as contained in the Sixth Amendment, directly conflicted and contradicted with the Use of Proceeds provisions of the New Loan and Purchase Agreement.

78. Instead, FUNB chose to remain silent, knowing that Kodak was being misled and that Kodak never would have made the New Kodak Loan if it had known the truth.

79. When Kodak made the New Kodak Loan, Kodak did not know that the Sixth Amendment expressly and directly conflicted with the Use of Proceeds provisions of the New Loan and Purchase Agreement.

80. Kodak did not receive or have access to a copy of the Sixth Amendment.

81. When Kodak made the New Kodak Loan, Kodak did not know that FUNB had increased Wolf's borrowing ratios.

82. When Kodak made the New Kodak Loan, Kodak did not know of Wolf's actual or imminent violation of the Credit Agreement Financial Covenants.

83. On or about March 28, 2000, Kodak disbursed the entire Thirty Million Dollars ($30,000,000.00) of the proceeds of the New Kodak Loan (the "Kodak Loan Proceeds").

84. Kodak transferred its funds from New York to an account under Wolf's name at FUNB.

85. On or about March 28, 2000, upon information and belief, FUNB, acting as Administrative Agent on behalf of the Lenders, seized Kodak's funds intended for Wolf and applied them to reduce Wolf's indebtedness to the Lenders.

86. Kodak was not notified that the monies it loaned to Wolf for a particular purpose had been used by FUNB to repay the Lenders.

87. FUNB concealed and withheld the terms of the Sixth Amendment from Kodak and concealed and withheld the fact that they had converted and used the Kodak Loan Proceeds.

88. FUNB continued to conceal and withhold the fact that it had converted the Kodak Loan Proceeds.

89. The use of the Kodak Loan Proceeds to repay the Lenders was a breach of the "Use of Proceeds" covenants contained in §§ 3.3 and 9.1 of the New Loan and Purchase Agreement.

90. Kodak would not have agreed to the New Kodak Loan if it had been aware of the terms of the Sixth Amendment requiring the proceeds of its loan to be paid to the Lenders or of the Lenders' agreement to increase Wolf's borrowing ratios or of the actual or imminent violations of the Credit Agreement Financial Covenants.

COUNT I

Breach of Contract

91. The allegations contained in paragraphs numbered 1 through [~~91~~]90 above are incorporated by reference as if fully set forth herein.

92. FUNB materially breached the terms of the Inter-creditor Agreement by failing to give Kodak written notice of its actions, which significantly, directly and adversely affected Kodak with regard to the ability of Wolf to meet its obligations to Kodak.

93. FUNB materially breached the terms of the Inter-creditor Agreement by failing to give Kodak written notice of its agreement to increase Wolf's borrowing ratios.

94. FUNB materially breached the terms of the Inter-creditor Agreement by failing to give Kodak written notice of the actual or potential violation by Wolf of the Credit Agreement Financial Covenants.

95. Upon information and belief, FUNB failed to give Kodak written notice of the increase in borrowing ratios or of Wolf's actual or potential violations of the Credit Agreement Financial Covenants in order to induce Kodak to make the New Kodak Loan to Wolf so that it could surreptitiously convert and obtain the use of Kodak's funds to benefit itself.

96. Upon information and belief, FUNB failed to notify Kodak that the terms of the New Loan and Purchase Agreement materially conflicted with the Sixth Amendment in order to induce Kodak to make the New Kodak Loan to Wolf so that it could surreptitiously convert and then use Kodak's funds to benefit itself.

97. FUNB's failures to give Kodak written notice of the increase in borrowing ratios, the actual or potential violation of the Credit Agreement Financial Covenants and the requirement of the Sixth Amendment that the Kodak Loan

Proceeds be paid directly to it were each a breach of the implied covenant of good faith and fair dealing implied in the Intercreditor Agreement.

98. FUNB's failure to notify Kodak that the terms of Sixth Amendment materially conflicted with the terms of the New Loan and Purchase Agreement was a breach of the implied covenant of good faith and fair dealing.

99. FUNB acted in bad faith, intentionally, willfully or in a grossly negligent manner.

100. FUNB's breach caused Kodak harm.

COUNT II

Fraud

101. The allegations contained in paragraphs numbered 1 through [~~91~~]100 above are incorporated by reference as if fully set forth herein.

102. Upon information and belief, FUNB withheld and concealed the fact that it had agreed to increase the borrowing ratios, and that Wolf was in actual or imminent violation of the Credit Agreement Financial Covenants to induce Kodak to make the New Kodak Loan, and to surreptitiously obtain Kodak's funds to repay itself.

103. Kodak relied on FUNB to advise it of any modifications to or increases in the borrowing ratios and Credit Agreement Financial Covenants, based upon FUNB's prior practice and their course of conduct.

104. FUNB knew Kodak would be [~~mislead~~]misled by its failure to disclose the increase in the borrowing ratios and Wolf's actual or imminent violation of the Credit Agreement Financial Covenants.

105. Upon information and belief, FUNB knew that if it disclosed the true facts of Wolf's finances, Kodak would never have made the New Kodak Loan.

106. FUNB [~~mislead~~]misled Kodak by reviewing, consenting to and commenting upon the draft of the New Loan and Purchase Agreement, and implying its consent to the New Kodak Loan, without ever disclosing to Kodak that, through the Sixth Amendment, it was requiring Wolf to breach the express terms of its obligations to Kodak.

107. FUNB knew that Kodak made the New Kodak Loan while acting on the mistaken assumption that the Kodak Loan Proceeds would be used in a manner consistent with the express provisions of the New Loan and Purchase Agreement.

108. In fact, FUNB knew that it was requiring that the Kodak Loan Proceeds be used to repay the Lenders.

109. Upon information and belief, FUNB concealed this fact because it knew Kodak would never have agreed to lend Wolf funds that would be paid directly to FUNB.

110. FUNB knew that these facts were known only to it and were not available to Kodak.

111. FUNB knew that Kodak would expect it to disclose any provision of the draft of the New Loan and Purchase Agreement that was inconsistent with or contradicted by facts known only to FUNB.

112. Upon information and belief, FUNB concealed and withheld these facts because it wanted to induce Kodak to make the New Kodak Loan so that it would obtain the Kodak Loan Proceeds to repay the Lenders.

113. FUNB knew that Kodak was operating on the basic factual assumption that the Kodak Loan Proceeds would be used in conformity with the terms of the New Loan and Purchase Agreement.

114. FUNB knew that its requirement that the Kodak Loan Proceeds be paid to the Lenders destroyed the entire purpose of the New Kodak Loan, an essential purpose of which was [~~being made by Kodak solely~~] to finance Wolf's expansion.

115. As a result of FUNB's actions, Kodak was harmed.

COUNT III

Tortious Interference with Contract

116. The factual allegations contained in paragraphs numbered 1 through [~~116~~]115 above are incorporated by reference as if fully set forth herein.

117. FUNB was aware of the New Loan and Purchase Agreement.

118. FUNB compelled, coerced and caused Wolf to enter into the Sixth Amendment, so that it could surreptitiously obtain the benefit of the direct use and conversion of the Kodak Loan Proceeds.

119. FUNB induced and caused Wolf to breach the terms of the New Loan and Purchase Agreement by requiring Wolf to agree to misapply the Kodak Loan Proceeds to repay the Lenders.

120. FUNB knew that Kodak would not have agreed to the New Kodak Loan if it had known the proceeds would be used to pay FUNB directly.

121. FUNB acted solely to benefit itself and to obtain the unwarranted and improper direct personal benefit of the use and conversion of Kodak's funds.

122. FUNB acted to defraud Kodak by obtaining Kodak's monies for its own uses.

123. FUNB, without justification, intentionally caused Wolf to breach the New Loan and Purchase Agreement.

124. FUNB acted intentionally and with the specific intent[,] and knowledge that its actions, which benefited itself, would cause substantial, immediate and direct harm to Kodak.

125. Kodak was injured by [~~the~~]FUNB's tortious interference [~~by FUNB~~]with Kodak's contract with Wolf.

[~~COUNT IV~~]

[~~Equitable Subordination~~]

[~~127. The factual allegations contained in paragraphs numbered 1 through 126 above are incorporated by reference as if fully set forth herein.~~]

[~~128. FUNB's conduct constitutes "inequitable conduct" sufficient for the application of equitable subordination pursuant to 11 U.S.C. § 510(c).~~]

[~~129. FUNB acted wrongfully, severely unfairly, egregiously, intentionally, in bad faith, fraudulently or in a grossly negligent manner.~~]

[~~130. By obtaining the improper use and benefit of the Kodak Loan Proceeds, FUNB obtained an unfair and improper benefit at Kodak's expense.~~]

[~~131. As a result of Kodak's making the New Kodak Loan and the highly inequitable conduct of FUNB, Kodak was harmed by the immediate loss and misapplication of Thirty Million Dollars ($30,000,000.00) of the Kodak Loan Proceeds, and FUNB benefited to the extent that the outstanding balance of Wolf's indebtedness was reduced by Thirty Million Dollars ($30,000,000.00).~~]

[~~132. Subordinationof the claims of FUNB and the Lenders to the claims of Kodak, to the extent of Thirty Million Dollars ($30,000,000.00), would be a just and fair application of this Court's equitable powers and would be wholly consistent with other bankruptcy law.~~]

PRAYER FOR RELIEF

WHEREFORE, Kodak requests that the Court enter judgment granting the following relief:

[~~(a) That this Court exercise its equitable powers to subordinate the claims of FUNB against the bankruptcy estate of the Debtors to the claims of Kodak to the extent of Thirty Million Dollars ($30,000,000.00); or, in the alternative,~~]

(a) That this Court award damages to Kodak[~~in an amount to be determined at trial~~] resulting from the breaches by FUNB of its obligations to Kodak under the Intercreditor Agreement in an amount to be determined at trial; and

(b) That this Court award damages to Kodak resulting from the fraudulent acts of FUNB, in an amount to be determined at trial (including punitive damages)[~~, resulting from the fraudulent acts of FUNB~~];[~~and~~]

(c) That this Court award damages to Kodak resulting from the tortious interference by FUNB with Kodak's contractual relations with the Debtors in an amount to be determined at trial; and

(d) For such other and further relief, including compensatory, consequential and punitive damages, interest and attorneys' fees, [~~at law or equity,~~]to which this Court deems Kodak entitled.

Respectfully submitted,

NIXON PEABODY LLP
Attorneys for Plaintiff Eastman Kodak Company
/s/ _____
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APPENDIX M

§ 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and

(P) recognition of foreign proceedings and other matters under chapter 15 of title 11.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district

court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

(e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

APPENDIX N

§ 1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under subsection (c) (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. Subsection (c) and this subsection shall not be construed to limit the

applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction--

(1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and

(2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.